Supreme Court, U.S.
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In The Supreme Court of the United States

NAHQUASEH B. WAUBANASCUM,

Petitioner,

v.

SHAWANO COUNTY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the lower court fail to comply with the appropriate standard of review under Fed. R. Civ. P. 50 in vacating a jury verdict and reversing the District Court's denial of the Respondent's motion for judgment as a matter of law?

2. Did the Respondent, which licensed a foster parent with a criminal history involving children, and which later received word of sexual assault allegations against that foster parent, owe a constitutional duty to protect the Petitioner, a child placed in the foster parent's home, from harm at the hands of the foster parent?

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The Decision of the Court of Appeals is reported as *Nah[illegible]eh B. Waubanascum v. Shawano County*, 416 F.3d 658 (7th Cir. 2005), and is reproduced in Appendix A. The decisions of the District Court denying Respondent's motion for summary judgment, and Respondent's post-verdict motions for judgment as a matter of law and for a new trial, are unreported, but are reproduced in Appendices B and C, respectively.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Court of Appeals' Decision was entered on August 1, 2005.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

The text of relevant provisions of Chapter HSS 56 of the Wisconsin Administrative Code (1990) are reproduced in Appendix E.

STATEMENT OF THE CASE

The Petitioner, Nahquaseh B. Waubanascum, seeks review of the Decision of the Seventh Circuit Court of Appeals which vacated the District Court's judgment entered on the jury's verdict in favor of the Petitioner. The District Court had original jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) and (4).

The Petitioner commenced this action under 42 U.S.C. § 1983. The Petitioner, while a minor foster child, was subjected to a series of sexual assaults over a period of two months by his foster parent, Mark Fry, who had received a foster care license from the Respondent, Shawano County. The Petitioner asserted that he was deprived of his due process rights under the Fourteenth Amendment to the United States Constitution as a result of Shawano County's issuance of a foster care license to Fry, and its subsequent failure to monitor the license after receiving reports of a sexual assault committed by Fry against another minor.

Shawano County moved for Summary Judgment on October 30, 2003, and the motion was denied by the District Court on March 9, 2003. The District Court determined that there were genuine issues of material fact concerning whether the Petitioner had been deprived of his constitutional rights as a result of a policy, practice, or custom of Shawano County. [App. B] The Petitioner's claims against Shawano County were tried to a jury beginning on May 10, 2004. On May 13, 2004, the jury returned a special verdict in favor of the plaintiff and found that Shawano County had applied its policy regarding issuance of foster care licenses at the request of other counties with deliberate indifference to the rights of the Petitioner, and awarded $175,000.00 in compensatory damages, plus costs. The District Court subsequently entered judgment in that amount, plus post-judgment interest

and taxable costs. After denying Shawano County's motion for judgment as a matter of law, the District Court entered an Amended Judgment in favor of the Petitioner, awarding an additional $69,259.50 in costs and attorney's fees, pursuant to 42 U.S.C. § 1988. [App. D]

The evidence presented to the jury established that Mark Fry received a foster care license from Shawano County in August 1995. The Petitioner was subsequently placed as a foster child in Fry's Shawano County home in September 1995.

Before relocating to Shawano County, Wisconsin, Mark Fry resided for more than 10 years in Illinois, where he was employed as high school teacher. In a bizarre incident in 1991, he was arrested and charged with attempted burglary and disorderly conduct when authorities found him on the roof of the home of one of his male students, wearing a "Ninja" outfit (dark clothing and a mask), and carrying a flashlight and a can of mace. [App. F-18 to F-22] This incident was publicized in the Chicago Tribune and local newspapers. [App. F-26] Fry was later convicted of disorderly conduct. [App. F-25 to F-26]

The files of the Northbrook, Illinois Police Department contain additional pertinent documentation concerning Fry, including a statement of another minor who reported observing a figure dressed in dark clothing in his backyard at night on 10 to 15 occasions. [App. F-24] On several occasions, he identified the individual as Mark Fry. [App. F-24] The file also contained a letter from a "Concerned Citizen," in which the author called Fry's actions suspect and "deviant" in nature. [App. F-25] All of this law enforcement information (including a picture of Fry in his "Ninja" outfit) was publicly available before Shawano County issued the license to Fry in August 1995. [App. F-22 to F-23, F-25]

In or about July 1995, Fry applied for a foster care license through Menominee County. However, because Fry resided in Shawano County, by law only Shawano County could issue him a foster care license. Shawano County issued the foster care license to Fry, at the request of Menominee County. Shawano County was thus the "licensing agency" in this case. [App. F-3]

According to (then) Chapter HSS 56 of the Wisconsin Administrative Code, a prospective foster care license applicant was required to provide authorization to the licensing agency to perform a criminal background check with the Wisconsin Department of Justice, local, and federal law enforcement agencies. [HSS 56.03(4)(a)(2), 56.04(4m)(a); App. E-4 to E-5, E-8; F-3] An applicant was unqualified to hold a license if he or she had been convicted of a felony or misdemeanor and if the circumstances of the conviction related substantially to the care of children. [HSS 56.04(4m)(b)(1); App. E-8] The code further required that the applicant submit his or her employment history to the licensing agency. [HSS 56.03(4)(a)(8); App. E-5]

When receiving a request from another county to license one of its own residents, Shawano County's established practice was to rely solely on the requesting county to conduct all necessary and appropriate background checks and the investigation of the prospective foster parent required of the licensing agency under Wisconsin law. [App. F-8, F-12] On occasion, Shawano County would issue foster care licenses when the criminal background check had not yet been completed. [App. F-42 to F-45]

A Menominee County employee spoke with two of the three references Fry had listed on his application. [App. F-37] The employee could not recall whether or not she had spoken to Fry's employer or to any of his previous

employers. [App. F-38] Menominee County submitted the criminal background check authorization received from Fry to the Wisconsin Department of Justice, whose inquiry did not include a check for criminal convictions in states other than Wisconsin, including Illinois, where Fry had previously resided.

Ronald Stuber, the Director of the Shawano County Department of Social Services, signed the foster care license granted to Mark Fry, with an effective date of August 21, 1995. [App. F-8; Ex. 1005] Stuber was the official responsible for determining whether Shawano County would issue a foster care license to a prospective applicant, and had final authority over that decision. [App. F-7] The only document reviewed by Stuber prior to issuing the foster care license to Fry was a copy of the two-page home study report completed by Menominee County. [App. F-4, F-10] Consistent with its policy, Shawano County issued the license to Fry without conducting the licensing requirements set forth in HSS 56 of the Wisconsin Administrative Code. [App. F-8 to F-10][1] Shawano County did not receive any criminal background check authorization f m Fry. [App. F-9] Shawano County did not obtain any criminal or employment history from Fry. [App. F-3, F-5 to F-6, F-9, F-10] Shawano County did not contact any of the schools where Fry had been employed. [App. F-5 to F-6] Shawano County did not make any effort to verify that Menominee County had complied with the licensing requirements. [App. F-13 to F-14] Shawano County did not take any action to monitor the license after it had been issued, or to ascertain

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[1] When asked to identify the provision in HSS 56 wh permitted the licensing agency to delegate its responsibilities u. r the code, Richard Kane, the Deputy Director of the Shawano C nty Department of Social Services, was unable to do so. [App. F-7]

whether Fry had committed any type of crime after receiving his license. [App. F-14][2]

On October 21, 1995 (after the Petitioner had been placed in the Fry foster home), Shawano County Deputy Sheriff Randall Giese was called to the emergency room at the Shawano County Community Hospital to investigate the possible drugging and sexual assault of a minor. [App. F-15] The minor reported that, while visiting Mark Fry's home the night before, he drank some juice, after which he went upstairs to bed because he felt groggy and believed he had dreamed that Fry was "messing" with him. [App. F-16] The minor also reported that he believed that Fry had rubbed his penis on his leg, and that Fry had touched his genitals. [App. F-16] Officer Giese contacted an intake worker at the Shawano County Department of Social Services to report the drugging and sexual assault allegations against Fry. [App. F-17] Officer Giese believes he had other conversations with representatives of the Shawano County Department of Social Services regarding the October 21, 1995 incident. [App. F-18] No action was taken by Shawano County to remove the Petitioner from the Fry home, or to revoke or suspend Fry's license.

Beginning in December 1995, the Petitioner began to have dreams about Fry fondling him, masturbating in his presence, attempting to force him to perform oral sex on Fry, and attempting to penetrate his anus. [App. F-26, F-31 to F-32] In addition to other incidents, during a trip to Albuquerque, New Mexico, Fry ordered a pornographic

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[2] As of September 24, 2001 (the date when Ronald Stuber signed responses to written interrogatories on behalf of Shawano County), Stuber did not know whether a criminal background check had ever been conducted on Fry in connection with his application for a license, or what the results of any such check may have been. [App. F-13 to F-14]

movie from the hotel in which he and the Petitioner were staying, and attempted to have intercourse with the Petitioner. [App. F-27, F-32 to F-33] Fry pulled down the Petitioner's pants, and climbed naked into the Petitioner's bed. [App. F-32 to F-33] The Petitioner locked himself in the bathroom, and when he returned, Fry had his legs in the air and again asked the Petitioner to have intercourse with him. [App. F-33]

The Petitioner was finally removed from Fry's home in February 1996 after reporting the abuse to his grandmother and his case worker. Fry was charged criminally for his abuse of the Petitioner and the other minor, and is presently serving out his sentence in the Oshkosh (Wisconsin) Correctional Facility.

At trial, the jury heard extensive testimony from Ronald Stuber and from Richard Kane, the Deputy Director of the Shawano Department of Social Services, regarding the foster care licensing process. Mr. Kane testified that Fry would never have been issued a foster care license had Shawano County been aware of his criminal background in the State of Illinois, arising out of his nocturnal activities in the "Ninja" costume. [App. F-6]

Ronald Stuber testified that Chapter 48 of the Wisconsin Statutes specifically mandates a child's right to be placed in a safe and secure home that is free from physical, sexual, or emotional injury or exploitation. [App. F-41] He further testified that the requirements of HSS 56 of the Wisconsin Administrative Code are in place for the specific purpose of verifying whether or not prospective applicants are qualified to receive a license. [App. F-41 to F-42] When asked if the shortage of foster parents alleviates the need to make sure that foster homes are suitable for children, Stuber replied "Of course not...That is why you want to do an extensive study, to insure the safety of children." [App. F-

41] He acknowledged this same duty would apply, even in the absence of a statute directing such a study. [App. F-41] In response to the question of whether his agency's obligation ended when it obtained the criminal background authorization, Stuber responded "We have to do more...We have to do all we can." [App. F-45] He also testified that Shawano County had the authority to remove the Petitioner from Fry's home for his protection at any time. [App. F-39]

Shawano County moved for judgment as a matter of law at the close of the plaintiff's case, which was denied by the District Court. [App. F-33 to F-35] After the verdict, Shawano County filed another motion for judgment as a matter of law, or alternatively, for a new trial, which was denied by the District Court in a Decision and Order dated August 24, 2004. [App.C] The District Court concluded that Shawano County had a special relationship to the Petitioner, and therefore an affirmative duty to protect him from harm, which it failed to do. [App. C-4]

The District Court futher found that the evidence at trial established that Shawano County had a long-standing custom of granting licenses at the request of other counties without conducting investigations of the applicants, and that this custom was authorized by Shawano County's policy-making official. [App. C-5] The District Court found that the laws and regulations of Wisconsin specifically mandate Shawano County's duties to children placed in foster homes in Shawano County: "[T]he policy of not conducting an investigation insured that the Defendant would not have knowledge of a potential foster parent's criminal history background." [App. C-6] Because Ron Stuber, Shawano County's policy-maker, acknowledged that foster children are threatened by harm when adequate checks are not conducted, the District Court concluded that "the Defendant cannot be absolved of liability for lack of knowledge at the

policy making level." [App. C-6, citing *Canton v. Harris*, 489 U.S. 378 (1989)]

With respect to the sexual assault allegations reported by Officer Giese to Shawano County, the District Court found that the jury could reasonably infer from this evidence that Shawano County had no procedures or requirements for notification of superiors when such allegations were made against foster parents licensed by Shawano County, which exhibited deliberate indifference on the part of Shawano County and its policy-making officials to the safety of foster children. [App. C-8 to C-9]

Shawano County appealed, and on August 1, 2005, the Seventh Circuit Court of Appeals reversed the District Court's denial of Shawano County's motion for judgment as a matter of law, and vacated the judgment of the District Court entered on the jury's verdict.

REASONS FOR GRANTING THE PETITION

Several lower courts have issued varying opinions on the constitutional rights of foster children in a variety of contexts. However, this Court has not specifically addressed the constitutional rights of foster children, and governmental duties toward those children.

Here, the lower court reversed a jury verdict finding that a county's policy, practice, and custom with respect to issuing and monitoring foster care licenses was deliberately indifferent to the constitutional rights of the Petitioner, a foster child who was sexually abused by his foster parent. The Petitioner submits that the lower court disregarded material evidence, in violation of the Fed. R. Civ. P. 50 standard for reviewing jury verdicts. Consequently, the Petitioner moves this Court to grant the petition for a writ of

certiorari to protect the standard of review of Rule 50 motions by the lower courts.

Furthermore, the appropriate care and protection of foster children, who depend on the state for their care and protection, is an issue of critical national importance.[3] It is imperative that the lower courts, and children and state actors within the foster care system, obtain clear, certain, and uniform guidance as to the duties and responsibilities of those entrusted with the care and protection of foster children.

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[3] According to data collected from the Adoption and Foster Care Analysis and Reporting System, in the year 2001, 290,000 children entered the foster care system in the United States. National Clearinghouse on Child Abuse and Neglect Information (DHHS), *Foster Care National Statistics*, 2003 (National Clearinghouse on Child Abuse and Neglect Information website, (http://nccanch.acf.hhs.gov/pubs/factsheets/foster.cfm). According to *Child Maltreatment 2001*, 0.5% of perpetrators of abuse or neglect were foster parents, which equates to an estimated 4,239 perpetrators and 5,133 instances of abuse or neglect in 2001. *Id.* More alarming statistics were summarized in a recent law review article. A survey concluded that the rates of abuse of children in foster care were up to ten times higher than that of children in the general public. Another study concluded that, after accounting for unreported or uninvestigated cases, "forty-three percent of children studied had been placed in unsuitable foster homes, and that fifty-seven percent...were at serious risk of harm while in foster care." *See* Christine M. Dine, *"Protecing Those who Cannot Protect Themselves: State Liability for Violation of Foster Chidlren's Right to Safety,"* 38 Cal. W.L. Rev. 507, 509-510 (Spring 2002)(citing Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 Harv. C.R.-C.L. L. Rev. 199, 206-07 (1988)).

I. THE DECISION BELOW CONFLICTS WITH THE STANDARD OF REVIEW FOR RULE 50 MOTIONS ESTABLISHED BY THIS COURT.

Motions for judgment as a matter of law may be granted "if there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party on the issue." Fed. R. Civ. P. 50. Upon renewal of the motion after verdict, the trial court may allow the judgment to stand, order a new trial, or direct entry of judgment as a matter of law. Here, the Court of Appeals noted that "attacking a jury verdict is a hard row to hoe." *Waubanascum*, 416 F.3d at 670 (citation omitted); [App. A-19] Nevertheless, the Court vacated the jury's verdict, which had been approved by an experienced trial judge following motions after verdict. In doing so, the Court of Appeals disregarded the well-established Rule 50 standards, and improperly ignored material evidence heard by the jury.

This Court has commented on numerous occasions regarding the sanctity of jury verdicts, and the principles of appellate review under Rule 50 are well-established. "The jury's factual determinations as a general rule are final." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 625 (1991). Furthermore, "[o]nly when there is a complete absence of probative facts to support the conclusion reached (by the jury) does a reversible error appear." *Lavender v. Kurn*, 327 U.S. 645, 653 (1946). In *Denesha v. Farmers Ins. Exchange*, 161 F.3d 491, 497 (8th Cir. 1998), *cert. denied*, 526 U.S. 1115 (1999), the Eighth Circuit recently articulated the applicable standard of review as follows:

> In reviewing a denial of a motion for judgment as a matter of law, we must (1) consider the evidence in the light most

> favorable to [the plaintiff], (2) assume that all conflicts were resolved in favor of [the plaintiff], (3) assume as proved all facts that [the plaintiff's] evidence tended to prove, (4) give [the plaintiff] the benefit of all favorable inferences that may reasonably be drawn from the proved facts, and (5) deny the motion unless all the evidence points one way and is susceptible of no reasonable inferences sustaining [the plaintiff's] position.

Here, the Court of Appeals found that there was no evidence supporting the conclusion that Shawano County owed any constitutional duty to the Petitioner. The case was submitted to the jury on the issue of Shawano County's policy, practice, and custom regarding foster care licenses issued at the request of other counties and its follow-up post-issuance. Consequently, the jury was required to analyze the case under the principles of *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), and its progeny.

In its decision, the Court of Appeals applied a "modified deliberate indifference" standard, relying on *K.H. through Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990), *J.H. ex rel. Higgin v. Johnson*, 346 F.3d 788 (7th Cir. 2003), and *Lewis v. Anderson*, 308 F.3d 768 (7th Cir. 2002).[4] These

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[4] Other circuits have applied the "professional judgment standard," set forth in *Youngberg v. Romeo*, 457 U.S. 307, 314 (1982), in foster care settings. *See Yvonne L. ex rel. Lewis v. New Mexico Department of Human Services*, 959 F.2d 883, 892 (10th Cir. 1992); *Winston v. Children and Youth Servs. of Delaware County*, 948 F.2d 1380 (3rd Cir. 1991), *cert. denied*, 504 U.S. 956 (1992); *see also T.M. ex rel. Cox v. Carson*, 93 F. Supp. 2d 1179 (D. Wyo. 2000), *citing Wendy H. v. City of Philadelphia*, 849 F.Supp. 367, 371-72 (E.D. Penn. 1994)(noting that the defendants' suggestion that they could not be liable unless they knew or

cases provide that, to be liable in a foster care context, individual state actors must know of or suspect a specific risk facing a child, and consciously ignore it or fail to stop abuse once it is discovered.

The present case involves a claim against Shawano County itself, based on its policy, practice, and custom, and that was the issue submitted to the jury. A municipal policy choice which exhibits deliberate indifference to the rights of its citizens is an actionable policy. *See Canton v. Harris*, 489 U.S. at 389; *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 124-28 (1992)(noting that a City may be liable when a policy or practice causes the constitutional injury even if no individual officer is found constitutionally liable); *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720, 725 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990)("Nothing in [*DeShaney v. Winnebago County*] suggests that state officials may escape liability arising from their policies maintained in deliberate indifference to actions taken by their subordinates."); *Ruge v. City of Bellevue*, 892 F.2d 738, 742 (8th Cir. 1989) ("We deem a policy, if adopted and proven, that would show a city actively pursued conduct which was deliberately indifferent to the constitutional rights of its citizens, would reach

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suspected that the foster child was being molested would encourage an "ostrich" approach to placement of foster children). As the District Court's decision herein implied, it would be impossible for a municipality's policy-makers to ever learn of any disqualifying information regarding an applicant if they failed to conduct any background check or monitor the licensee/placement. The Wisconsin Supreme Court has expressly held that the professional judgment standard controls the issue of liability in safe placement cases under applicable Wisconsin law. *Kara B. v. Dane County Dept. of Human Serv.*, 205 Wis. 2d 140, 160, 555 N.W.2d 630, 638 (Wis. 1996).

constitutional dimensions and be actionable under the Civil Rights Act.").

This is precisely what the jury determined in this case, and there was ample evidence in the record to support that conclusion. Based on the evidence, the jury concluded that Shawano County's policy was enacted and followed with deliberate indifference to the safety of foster children. In the process of usurping the jury's function, the Court of Appeals disregarded the bulk of the evidence supporting the jury's conclusion.

The jury heard extensive testimony from Shawano County's own witnesses regarding the known risk posed to foster children if appropriate background checks were not completed. However, Shawano County never followed the statutory requirements regarding background checks when issuing foster care licenses at the request of another county. Ronald Stuber testified that thorough checks were vital to protect foster children, even in the absence of legislation specifically mandating such checks. Yet, he also conceded (after repeated questioning by plaintiff's counsel and the District Court itself) that he had a practice of issuing licenses prior to the completion of the criminal background checks on the prospective applicant. [App. F-42 to F-45]

When an element of a claim is whether a state actor knew of the existence of a particular risk of injury, a jury may infer that the requisite knowledge existed from facts that demonstrate that the particular risk was obvious. *See, e.g. Farmer v. Brennan*, 511 U.S. 825, 842 (1994); *Hall v. Bennett*, 379 F.3d 462, 465 (7th Cir. 2004)(jury may infer knowledge of obviousness of risk based on professional status of official). In addition, the jury could infer deliberate indifference to the Petitioner's welfare from a pattern of omissions revealing deliberate inattention to specific duties imposed for purposes of safeguarding foster children. *See*

Doe v. New York City Dept. of Social Services, 649 F.2d 134, 145 (2nd Cir. 1981).

Based on the evidence presented to the jury, Shawano County officials were clearly aware of the vulnerability of foster children, and the risk of harm they face. However, its policy-making official sanctioned a policy whereby licenses were issued by Shawano County without verifying that the appropriate safety and criminal background checks had been completed. In other words, not only could the jury infer that the risk posed by the policy was obvious, the jury was presented with testimony that the policy-maker for Shawano County was specifically aware of the risk; thus, the jury had every right to conclude that Shawano County chose to ignore that risk.

The jury also heard evidence that Shawano County had received actual notice of sexual assault allegations by a minor child against its licensee. Shawano County therefore had the duty to investigate and remove the Petitioner from Fry's home, and to revoke or suspend Fry's license, but deliberately failed to do so until after Fry had abused the Petitioner.

Fry was licensed to care for one foster child, at the specific request of Menominee County. Therefore, the jury could infer that Shawano County officials had knowledge that a foster child would be placed in Fry's home. Such licenses were specifically granted so that the licensed home could be used by the requesting county.[5] *See Delaney v.*

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[5] Stuber testified that Shawano County became involved in the process of licensing Mark Fry because: "Basically at the time someone is seeking to place a child, after a period of time [the prospective foster parent has] to be licensed as a foster parent." [App. F-39] Shawano County knew that Menominee County intended to place a child in the Fry home, as Menominee County

DeTella, 256 F.3d 679, 686 (7th Cir. 2001)(an inmate who brought Eighth Amendment claim was only required to establish that defendants acted with deliberate indifference to all members of a class of which he was a member, rather than that they were aware of his status as the most likely victim).

Shawano County's witnesses repeatedly testified that Menominee County, not Shawano County, was responsible for monitoring the Fry foster home. Based on this testimony, the jury drew the reasonable inference that Shawano County officials failed to take any action when confronted with knowledge of allegations against its licensee because of Shawano County's policy of exclusive reliance on the requesting county to investigate prospective foster parents and to monitor homes licensed by Shawano County. The jury was entitled to infer that Shawano County officials were deliberately indifferent to the known risk posed by Mark Fry to his foster child as a result of Shawano County's policy.[6] As the District Court noted, the jury could also reasonably infer from this evidence that Shawano County had no procedures or requirements for reporting or investigation of

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would not have requested the license unless it intended to place a child in the home.

[6] Despite Stuber's testimony admitting a duty to do everything possible to protect foster children from harm, the Court of Appeals concluded that there was no evidence indicating that Shawano County was required to monitor the license. 416 F.3d at 670; [App. A-18]. However, A.R. Vinent-Cantoral, the Petitioner's expert, criticized Shawano County for failing to investigate the sexual assault allegations against Fry, and to remove Waubanascum from Fry's home until such an investigation was complete, consistent with duties imposed under Chapter 48 (Wisconsin Statutes) and HSS 56 (Wisconsin Administrative Code). [App. F-30 to F-31] The Court of Appeals ignored this testimony.

abuse allegations when made against foster parents licensed by Shawano County, again exhibiting deliberate indifference on the part of Shawano County and its policy-making officials to the safety of foster children. [App. C-6] *See Canton*, 489 U.S. at 378 (failure to promulgate a policy may demonstrate deliberate indifference and be grounds for liability under § 1983).

Alternatively, the jury could infer that officials from Shawano County were in fact advised of the abuse allegations, but failed to take appropriate action to protect the foster child. *See Farmer*, 511 U.S. at 842 (jury may infer knowledge from circumstantial evidence alone); *Delaney*, 256 F.3d at 685 (jury may infer from surrounding circumstances that officials had been exposed to information regarding a risk). The jury was permitted to infer that Stuber or Kane had actual knowledge of the sexual abuse allegations leveled against Fry by another minor, but failed to take any action. While the Court of Appeals noted that both Stuber and Kane denied knowledge of this incident prior to April 1996, it is the jury's role, not that of an appellate court, to assess the credibility of witnesses. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000)(the district court can disregard all evidence favorable to the moving party that the jury is not required to believe); *Courtney v. Biosound, Inc.*, 42 F.3d 414, 424 (7th Cir. 1994)(it is the function of the trier of fact to choose among competing inferences and to make credibility determinations).

The Seventh Circuit's myopic view of the evidentiary record, and its application of the controlling Supreme Court precedent to that record, did not comport with the applicable Rule 50 standards, and must be reversed.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS APPLYING THE EXCEPTIONS SET FORTH IN *DeSHANEY V. WINNEBAGO COUNTY.*

Even assuming that the Petitioner was required to establish a constitutional duty uniquely owed to the Petitioner by Shawano County (above and beyond the duty not to pursue a policy which was deliberately indifferent to the safety of foster children), precedent and the evidence establishes that such a duty existed.

The substantive due process right to personal security and bodily integrity is sacrosanct. This Court has recognized this constitutional right in variety of contexts. *See, e.g., Ingraham v. Wright,* 430 U.S. 651, 673 (1977)(declaring that "[a]mong the historic liberties" protected by the Due Process Clause is the right to be free from "unjustified intrusions on personal security")(footnote omitted).

In *DeShaney v Winnebago County Dept. of Social Services*, 489 U.S. 195 (1989), this Court held that the state generally has no affirmative duty to protect an individual from private harm. However, this Court expressly recognized two exceptions to this general rule, namely that the Constitution imposes an affirmative duty of care and protection in circumstances where the state and the individual have a "special relationship," such as a custodial relationship, or when the state has created or enhanced a dangerous situation.

Several courts have recognized a child's constitutional right to be placed in a safe and secure foster home. *See K.H. through Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990); *Ray v. Foltz*, 370 F.3d 1079, 1082-83 (11th Cir. 2004)(recognizing foster child's right to reasonable

safety while in foster care); *Yvonne L. ex rel. Lewis v. New Mexico Department of Human Services*, 959 F.2d 883, 892 (10th Cir. 1992) (foster children have a constitutional right to be reasonably safe from harm, such as sexual molestation).

Here, the Court of Appeals analyzed the "special relationship" exception and the "state created danger" exception in isolation from each other. The Court unambiguously, but erroneously, concluded that Shawano County could not be held liable under the special relationship exception to the *DeShaney* rule because Menominee County had "custody" of the Petitioner. In other words, under this analysis, absent a "legal" custodial relationship, there can be no "special relationship" imposing a duty on the state to protect a foster child from harm. This conclusion conflicts with decisions from other circuits, and ignores the plain evidence that Shawano County issued the foster care license to effectuate the custodial relationship of the Petitioner, pursuant to state foster care law. Without such issuance, placement of the Petitioner would have been illegal.

Circuits have found that diverse factual circumstances, including but not expressly limited to custodial settings, may give rise to "special relationships" between the state and an individual and corresponding duties to protect the individual from danger to his or her safety or bodily integrity. *See Horton v. Flenory*, 889 F.2d 454, 458 (3rd Cir. 1989)(holding that the state owed a duty to a suspect in private club based on functional custody by police officer); *Wells v. Walker*, 852 F.2d 368, 370 (8th Cir. 1988), *cert denied*, 489 U.S. 1012 (1989)(holding that when state transported a released prisoner to the victim's store, that "transportational link" placed the victim in a custodian-like unique, confrontational encounter with person with violent

tendencies, thus creating a "special relationship" and duty to protect).[7]

Therefore, an affirmative duty to protect can arise outside of traditional custodial situations, and the Seventh Circuit's exclusive emphasis on Menominee County's conduct improperly ignored the special relationship between the Petitioner and Shawano County, inherent in Shawano County's licensing mandate under state law.

Furthermore, the "state created danger" exception must be examined in the overall context of Shawano County's actions, and inaction, in this case. Significantly, this Court noted in *DeShaney* that the state, through its social workers, played no part in the creation of the danger facing the plaintiff, thus indicating that the state's role in creating or enhancing danger was a vital factor in the analysis. *DeShaney*, 498 U.S. at 201 ("When the [state] returned [the plaintiff] to his father's home, it placed him in no worse position than that in which he would have been had not acted at all...")[8]

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[7] The present case is analagous to the situation in *Wells v. Walker*, wherein the Court determined that a special, quasi-custodial relationship existed between the police officers and the victim. The evidence for such a relationship is much stronger here because Shawano County created the danger faced by the Petitioner when it issued the license, and subsequently had the opportunity to protect the Petitioner by removing him from the home prior to his being sexually assaulted on numerous occasions.

[8] Perhaps the most precise statement of the "state created danger" theory of liability was that of the Seventh Circuit Judge Posner in *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982): "If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." This formulation was subsequently recognized by this Court in *DeShaney*.

Here, the evidence establishes that Shawano County had a special relationship with the Petitioner, and a corresponding duty to protect him from harm. Shawano County, as a political subdivision of the State of Wisconsin, was authorized to issue foster care licenses, to take foster children into protective custody, and was required to comply with legal safeguards to protect foster children from harm. As the District Court noted, the specific purpose of Chapter HSS 56 of the Wisconsin Administrative Code is to protect the health, safety and welfare of children placed in foster home. [App. C-4, E-1] Consequently, the District Court concluded that a special relationship existed between the Petitioner and the State of Wisconsin and its subdivisions. [App. C, p. 4-5]

As the county of residence of the foster parent, Shawano County was the only entity authorized to license the foster parent. Absent Shawano County's granting the license to Mark Fry, the Petitioner would not have been placed in his care, providing Fry with the opportunity to assault the Petitioner. Without Shawano County's issuance of the license, there would have been no Fry foster home, and no placement. Additionally, if Shawano County had revoked or suspended the license after receiving news of the allegations against Fry, there would have been no abuse.

As the licensing agency, Shawano County was required to comply with the applicable statutes and regulations regarding the licensing process specifically intended to protect foster children from harm. Although state law violations, by themselves, do not rise to the level of a claim under 42 U.S.C. § 1983, the existence of laws designed to protect specific individuals can, as here, give rise to a constitutionally protected liberty interest, and expressly informs the issue of whether a special relationship exists between the Petitioner and Shawano County, especially in

light of a foster child's right to be placed in a safe and secure foster home. *See Youngberg v. Romeo*, 457 U.S. at 317 (discussing the duty of the state arising from the dependency of the individual on the state for care and protection); *White v. Rochford*, 592 F.2d 381, 385, n.6 (7th Cir. 1979)(the policy of statutes to protect children, when considered in the context of the function of the police, supports the existence of an affirmative duty to protect children endangered due to the performance of police duties).

Shawano County had a duty to investigate Mark Fry's background, and to investigate the abuse allegations against him which surfaced after it had issued the license. The jury was free to infer that Shawano County officials were aware of the risks posed by its conscious disregard of its duties, but chose to ignore them. In doing so, Shawano County created the risk of harm to the Petitioner, who was placed in a home licensed by Shawano County, and further enhanced that risk by failing to suspend Fry's license and remove the Petitioner from his care.

In this context, the Court of Appeals' reliance on *Ruiz v. McDonnell*, 299 F.3d 1173 (10th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003), is misplaced. In *Ruiz*, an employee of a state licensed day care center abused the plaintiff's child. The Court of Appeals concluded that the licensing of Fry, like the licensing of the day care center in *Ruiz*, did not create an immediate danger of harm, but rather a danger to the public as a whole. However, the present case does not involve a random injury to a random citizen, or a license issued to a day care facility whose multiple employees would be caring for a number of children over an extended period of time. Fry was licensed to care for one foster child. The jury could infer that Shawano County officials had knowledge that a foster child would be placed in Fry's home within a short time after the license was issued, and knew that a specific child had been placed by the

time that the allegations of drugging and sexual assault were made against Fry by another minor. Unlike the present case, there was no allegation that the state actors in *Ruiz* had notice of the danger posed by the employee of the day care center, but nevertheless failed to take any action to stop abuse at the hands of the employee. Here, the licensing of Fry (an unqualified foster parent), given Shawano County's failure to undertake any pre-licensing investigation, posed an immediate threat of harm to the one identifiable child placed in his care, the Petitioner, Nahquaseh B. Waubanascum.

Therefore, Shawano County owed a constitutional duty to the Petitioner, which it violated.

CONCLUSION

For the foregoing reasons, the Petitioner submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. _____

In The
Supreme Court of the United States

NAHQUASEH B. WAUBANASCUM,

Petitioner,

v.

SHAWANO COUNTY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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APPENDIX

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APPENDIX

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Relevant Portions of Chapter HSS 56
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Portions of the Trial Transcript ..... F

In the
United States Court of Appeals
For the Seventh Circuit

No. 04-3290

NAHQUASEH B. WAUBANASCUM,

Plaintiff-Appellee,

v.

SHAWANO COUNTY,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 01-C-111—**Thomas J. Curran**, *Judge.*

Argued January 20, 2005 – Decided August 1, 2005

Before FLAUM, *Chief Judge*, and BAUER and KANNE, *Circuit Judges*.

KANNE, *Circuit Judge*. Nahquaseh Waubanascum was placed into foster care in the Shawano County, Wisconsin, home of Mark Fry. Tragically, Waubanascum suffered sexual abuse at Fry's hands. Waubanascum brought a 42 U.S.C. § 1983 claim against Shawano County, alleging that the county deprived him of substantive due process when it issued a "courtesy" foster care license to Fry. A jury returned a verdict in Waubanascum's favor, and the district court entered judgment thereon against the county. We conclude, however, that Shawano County owed no constitutional duty to Waubanascum and thus is entitled to judgment as a matter of law. Accordingly, we vacate the judgment of the district

court and direct that judgment be entered in Shawano County's favor on remand.

I. Background

A tragic series of circumstances brought Nahquaseh Waubanascum into the vile clutches of Mark Fry. Waubanascum was raised by his grandparents on the Menominee Indian Reservation in Wisconsin. Waubanascum had a troubled childhood. In 1995, when Waubanascum was around fifteen years old, he stole a car and went for a joyride. Menominee County subsequently took legal custody of Waubanascum, removed him from his grandparents' home, and deposited him in a series of group homes for boys.

At the time, Fry was the principal at the Menominee Indian Junior/Senior High School. Fry befriended Waubanascum and visited him in the group homes for a time. Eventually, Fry suggested that Waubanascum come to live as a foster child in his home, and Waubanascum agreed. One wrinkle was that Fry's home was located not in Menominee County, which had custody of Waubanascum, but just across the line in neighboring Shawano County. Accordingly, Fry submitted his foster care application to Menominee County, not Shawano County.

Menominee County processed Fry's foster application in accordance with its standard procedure. As with all such applications, the process was lengthy and detailed. Among other things, the county constructed a foster home study, which involved several home visits to evaluate the physical condition of Fry's home. The process also entailed a number of interviews to determine whether Fry would be a suitable foster parent. The interviews evaluated Fry's views on various topics, including parenting, education, and

supervision. A Menominee County representative met with Fry at least three times for a total of eight to ten hours.

The resulting home study described Fry's residence, his family history, and his educational and work background, which included ten years of prior teaching experience in Illinois. The home study concluded that Fry was "a very intelligent and caring individual" whose "desire to help seems very genuine." In short, the study concluded that Fry met the state standards governing licensure of foster homes and that he was a good candidate for a license.

Menominee County also contacted two of Fry's personal references, who offered no information that raised any red flags. In addition, Fry gave written authorization for a criminal background check. The county arranged for the check in the same way it did with all of its foster care applications—it submitted a request to the Wisconsin Department of Justice ("DOJ") to undertake the task, which often requires six weeks to complete.

While Fry's criminal background check was proceeding, Menominee County reviewed all of the information it had gathered in Fry's case and concluded that he was an excellent candidate for a foster care license. Fry was well known in sparsely populated Menominee County. He was a licensed teacher, an experienced educator, and the principal of the local high school. One county social worker later described Fry as "very intelligent," "eager to assist," and "a valuable resource for kids who may . . . have educational issues." In short, Fry appeared to be an ideal foster parent, and at the time, the county had no reason to believe otherwise. Consequently Menominee County requested that Shawano County issue a foster care license to Fry. At the time of the request, Menominee County also informed Shawano County that it had initiated the criminal background check of Fry.

A request to issue a "courtesy" license of this sort was not uncommon; Shawano County had for years issued such licenses to Menominee County and other counties. Other Wisconsin counties did likewise. Shawano County's practice was to rely solely on the requesting county to conduct all background checks of the prospective licensee and to fulfill all of the requirements of relevant state law and regulations. The county had in the past issued licenses in cases like Fry's, in which the criminal background check was in progress but not yet completed.

Shawano County reviewed Fry's home study along with the other information pertaining to Fry's application that Menominee County provided. Persons reviewing Fry's file believed that a criminal background check had already been completed or was being handled by Menominee County, based on that county's earlier representation. On the basis of this belief, the positive information contained in the home study, and past positive experiences with courtesy licensing, Shawano County issued Fry a foster care license on August 21, 1995. Two months later, on October 16, Fry's criminal background check came back clean from Wisconsin's DOJ.

In September, Menominee County placed Waubanascum in Fry's home, although Menominee County kept legal custody over Waubanascum. In fact, under the terms of the license, Menominee County retained jurisdiction over, and responsibility for, the placement of any foster children in Fry's home. Regarding Waubanascum specifically, Menominee County continued to provide services to him and paid for his foster care placement with Fry. When it issued Fry's license, Shawano County did not know of Waubanascum or that he would be placed in Fry's home.

After placement, Waubanascum was monitored under Menominee County's "Intensive Supervision Program," the highest level of supervision by its social workers, which is

geared toward at-risk juveniles. Pursuant to the program, two certified social workers made face-to-face contact with Waubanascum seven days a week and with Fry and the school at least once a week. The social workers also visited Fry's home two to three times a week.

Not long after Waubanascum's foster care placement, disquieting information came to light about Fry. In October 1995, an Indian School student told someone at a hospital in Shawano County that Fry sexually abused him. The student described shopping for clothes with Fry, and then returning to Fry's home. The student drank some juice, became groggy, and went upstairs to nap. The student described "dreaming" that Fry had "messed" with him—that Fry rubbed his penis on the student's leg and fondled his genitals. Other evidence indicated that the student had been drugged and sexually assaulted.

Randall Giese, a Shawano County Sheriff's Deputy, investigated the allegations and informed the Menominee County Department of Social Services, which initiated its own investigation. Deputy Giese also informed an unnamed intake worker at Shawano County's Department of Social Services. Deputy Giese assured the worker that the child in question was safe and that he would continue the investigation. Deputy Giese later testified that he may have spoken with other Shawano County workers, as well.

In the wake of the allegations, Waubanascum's social workers questioned him without Fry present. Waubanascum, however, indicated that everything was fine and that he wished to remain in Fry's home. Menominee County considered removing Waubanascum from Fry's home, but decided not to on the basis of the results of its inquiry and the fact that Waubanascum was doing very well in terms of behavior, school attendance, and grades. The social workers

became more vigilant in their supervision of Waubanascum's status, but believed that Waubanascum was not at risk.

All was not well at the Fry home, however. In December 1995, Waubanascum began to have trouble sleeping and "dreamed" of Fry fondling him and masturbating in his presence as he attempted to sleep. Over the course of several months, these "dreams" progressed to more disturbing events during Waubanascum's waking hours. Fry often contrived to sleep in the same bed with Waubanascum. Worse, Fry became increasingly and openly physical with Waubanascum, giving him "backrubs" that ultimately led to undisguised attempts to engage in various sex acts with Waubanascum. These encounters took place in Fry's home and in various hotel rooms during several cross-country trips.

In February 1996, Waubanascum informed one of the Menominee County social workers about these acts of sexual abuse. That same day, Menominee County removed Waubanascum from Fry's home. On April 30, 1996, Shawano County revoked Fry's foster care license, and Fry was arrested and later convicted for his crimes.

It was only after the removal of Waubanascum from Fry's home that Fry's unsavory past came to light. Fry had been a history teacher for ten years in Illinois. In his off hours, however, Fry engaged in very disturbing behavior. In one bizarre instance, Fry was discovered at night on the roof of the home of one of his male students trying to peer into a window. Even more bizarre, Fry was dressed in black "ninja-style" attire, wearing a mask, and toting binoculars, a flashlight, and a canister of mace. Another student reported that he had spotted a similarly attired prowler in his backyard at night on more than ten occasions.

A person matching this description was also discovered attempting to enter the bedroom window of a sleeping

student. After pursuing the person on foot, the student was able to identify the person as Mark Fry. These acts garnered considerable public attention in Northbrook, Illinois, where Fry lived. Local authorities eventually arrested Fry in 1991 and charged him with attempted burglary and disorderly conduct. He was later convicted of misdemeanor disorderly conduct. Following these events, Fry moved to Wisconsin, where, amazingly, he was licensed as a teacher and hired as a high school principal in Menominee County.

Unfortunately, Fry's criminal past and history of bizarre behavior did not come to light when Menominee County processed Fry's foster care application. It was later discovered that when the Wisconsin DOJ performed its criminal background check of Fry, it limited its inquiry to reported criminal activity within Wisconsin, not elsewhere. This oversight, combined with the other unfortunate occurrences recounted above, resulted in Waubanascum being placed in Fry's home.

On January 30, 2001, Waubanascum filed suit in federal court against Menominee County, the Menominee Indian School District, and Shawano County. Waubanascum pursued his claims under 42 U.S.C. § 1983, alleging that each of the defendants violated his constitutional due process rights in issuing the foster care license and placing him in the foster care home with Fry. Waubanascum later settled his claims against Menominee County and the school district, and the district court entered an order dismissing those claims on February 18, 2004.

The case against Shawano County, however, proceeded to trial. Following the presentation of Waubanascum's case, Shawano County filed a motion for judgment as a matter of law, which the district court denied. On May 13, 2004, the jury returned a special verdict in favor of Waubanascum and against the county, and the court entered judgment in the

amount of $175,000, plus almost $70,000 in costs and fees. Shawano County filed another motion for judgment as a matter of law or, in the alternative, a new trial. The court denied this motion, and the county appealed.

II. Discussion

We review a denial of a motion for judgment as a matter of law *de novo*, viewing all the evidence in the light most favorable to the nonmovant. *See Gower v. Vercler*, 377 F.3d 661, 666 (7th Cir. 2004); *DeBiasio v. Ill. Cent. R.R.*, 52 F.3d 678, 682 (7th Cir. 1995). Pursuant to Rule 50, judgment as a matter of law is appropriate if "there is no legally sufficient evidentiary basis for a reasonable jury to find for [a] party on [an] issue . . . ." Fed. R. Civ. P. 50(a)(1). We examine the record as a whole to determine whether there was sufficient evidence from which a reasonable jury could have returned the verdict, *Marshall v. Teske*, 284 F.3d 765, 770 (7th Cir. 2002), but we may not reweigh this evidence nor substitute our own credibility determinations for that of the jury. *See Gower*, 377 F.3d at 666. If reasonable persons could not find that the evidence justifies a decision for a party on an essential element of its claim, the court should grant judgment as a matter of law. *Deimer v. Cincinnati Sub-Zero Prods., Inc.*, 58 F.3d 341, 343 (7th Cir. 1995).

It is important to keep in mind what this case is *not* about. Despite the lengthy recitation in the facts of the unfortunate miscues that led to Waubanascum's abuse, this case is not a state law tort action against Shawano County. This is a case alleging deprivation of due process rights secured under the federal constitution. Waubanascum's claims arise under 42 U.S.C. § 1983, which requires a plaintiff to show that (1) the defendant deprived him of a right secured by the Constitution and laws of the United States, and (2) the defendant acted under color of state law. *See J.H. ex rel. Higgin v. Johnson*, 346 F.3d 788, 791 (7th

Cir. 2003). The second requirement is not disputed in this case. As to the first, the jury agreed with Waubanascum's contention that Shawano County violated his Fourteenth Amendment due process rights. Specifically, the jury found that Shawano County had a policy or custom of issuing courtesy foster care licenses, and that the county acted with deliberate indifference to Waubanascum's constitutional rights when it issued Fry's courtesy foster care license in the first place and failed to monitor the license thereafter.

The Supreme Court has made it very clear that a state ordinarily has no constitutional duty to protect private citizens from doing harm to each other, so the state's failure to protect an individual from private injury does not violate that individual's due process rights. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). "[T]he Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation." *Id.* at 202. Even so, the Due Process Clause imposes such a duty when "state action creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger than they otherwise would have been." *Lewis v. Anderson*, 308 F.3d 768, 773 (7th Cir. 2002) (internal quotation and citation omitted). Accordingly, we have recognized two exceptions to *DeShaney*'s general rule. *See Monfils v. Taylor*, 165 F.3d 511, 516 (7th Cir. 1998) (citations omitted). One exception arises when the state has established a "special relationship" with an individual—if the state has custody of the individual, for example. *See id.* The other exception comes about when the state "affirmatively places a particular individual in a position of danger the individual would not have otherwise faced." *Id.* at 516 (citations omitted); *see also Lewis*, 308 F.3d at 773.

A. Special relationship exception

In the foster care context, we have recognized that a child has a constitutional right to be placed into a safe and secure foster home. Specifically, we have recognized that state actors are liable only if they violated "the right of a child in state custody not to be handed over by state officers to a foster parent or other custodian . . . *whom the state knows or suspects to be a child abuser*." *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990) (emphasis in original); *cf. DeShaney*, 489 U.S. at 201 n.9.

For there to be a constitutional duty, the state must have *custody* over the child, or it cannot be liable under the special relationship exception to *DeShaney*. *See Stevens v. Umsted*, 131 F.3d 697, 702 (7th Cir. 1997) (citing *DeShaney*, 489 U.S. at 200); *Hutchinson v. Spink*, 126 F.3d 895, 900 (7th Cir. 1997) ("[T]he State has a 'special relationship' with those it has taken into custody."). Under the facts presented, we do not see how a reasonable jury could find that Waubanascum satisfied this requirement at trial. As ample evidence indicates, and as Waubanascum concedes, Menominee County, not Shawano County, had custody over Waubanascum. Waubanascum lived in Menominee County and attended school there. Menominee County took him from his grandparents' custody after his involvement in petty crime. It processed Fry's foster care application. It investigated Fry's background and suitability to be a foster parent. It requested the criminal background check from the Wisconsin DOJ. It requested that Shawano County issue the foster care license (and the license specified that Menominee County would place children in Fry's home and maintain jurisdiction and custody over them). It monitored Waubanascum under its highest level of supervision during the time he was placed in Fry's home. It investigated the allegations of abuse lodged against Fry by the unnamed student. And, it ultimately removed Waubanascum from

Fry's home when Waubanascum reported the sexual abuse to Menominee County case workers. In short, Menominee County unambiguously exercised custody over Waubanascum in every respect except two: Fry's home happened to be in Shawano County, and Shawano County granted the courtesy license that allowed Waubanascum to be placed in Fry's home.

Waubanascum attempts to sidestep the unambiguous custody requirement by contending that Shawano County's "special relationship" with Waubanascum arose *because* it issued the courtesy foster license; had it not done so, Waubanascum never would have been placed with Fry to begin with. Waubanascum argues that Wisconsin laws and regulations set forth numerous requirements regarding foster licensing, thus indicating that Shawano County had a constitutional duty to him. He further argues that the county violated this duty by its policy of issuing courtesy licenses without undertaking its own background investigations, which exhibited "deliberate indifference" to Waubanascum's right to be placed in a safe foster home.

As to Shawano County's "policy," the evidence indicates that Shawano County issued courtesy foster licenses over the years under circumstances similar to those in Waubanascum's case—it relied on the requesting county to process the applications, conduct investigations, and initiate background checks. It is less clear whether Shawano County's practice in fact complied with Wisconsin law in effect at the time. The jury apparently believed that it did not, which is not surprising, given the extensive testimony to that effect at trial. But this fact is irrelevant in determining whether Shawano County's actions created a constitutional duty to Waubanascum, let alone whether it violated that duty. That state laws required Shawano County to perform its own background checks is not sufficient to create a "special relationship" that qualifies as a *DeShaney* exception.

State law does not create duties under the federal constitution, and violations of state law are by themselves insufficient to impose liability under § 1983. *See, e.g., J.H.*, 346 F.3d at 793 (collecting authority). If Shawano County's failure to conduct a separate background check was contrary to state law, such "dereliction of statutory duties should be of concern to . . . the [s]tate of [Wisconsin], [but] do[es] not form the basis of a § 1983 claim." *Id.* (citation omitted).

But even if Shawano County may somehow be understood to have had "custody" over Waubanascum by virtue of having issued a foster care license to Fry, this would not end the inquiry. Shawano County must also have exhibited deliberate indifference. In the foster care context, we apply a "modified" deliberate indifference standard. *Id.* at 792. Under this standard, the state must have actual knowledge or suspicion of the risk of harm the child may suffer while in foster care. As we noted in *K.H.*, "[t]he only right in question . . . is the right of a child in state custody not to be handed over by state officers to a foster parent . . . *whom the state knows or suspects to be a child abuser*. Only in this case thus narrowly described can the foster parent be fairly considered an instrument of the state for child abuse." *K.H.*, 914 F.2d at 852 (emphasis in original); *see also J.H.*, 346 F.3d at 795 ("[L]iability will only arise if the state actor knows or suspects that the agency or foster parents with whom a child is placed are likely to abuse the child."); *Camp v. Gregory*, 67 F.3d 1286, 1293 (7th Cir. 1995) (reiterating *K.H.*'s knowledge or suspicion requirement) (collecting authority).

Waubanascum suggests that Shawano County showed deliberate indifference by its "long-standing custom of granting courtesy licenses without conducting investigations of the applicants." Thus, he argues, "Shawano County's policy was deliberately indifferent to a known risk to foster children." Waubanascum seems to propose that state laws

and regulations assume that failure to perform background checks necessarily will expose foster children to risk, thus constituting deliberate indifference. This argument misstates the legal standard, because it sidesteps the requirement that there be knowledge or suspicion of actual risk and substitutes the possibility of risk arising from the county's custom. Undoubtedly, foster children would be exposed to a heightened degree of risk if foster license applicants were subjected to no background checks at all. We may assume that it is this very concern that underlies Wisconsin's laws and regulations requiring such background checks before a foster license may be granted.

But a failure to abide by a general statutory requirement for background checks cannot substitute for the requirement of actual knowledge or suspicion in the foster home context. *See J.H.*, 346 F.3d at 793 ("[C]onstructive or statutorily-implied knowledge cannot serve as a substitute for actual knowledge or suspicion."). As noted, it is unclear that Shawano County actually did violate Wisconsin law in effect at the time that the county granted Fry the courtesy foster license. But in any event, state law does not create a duty under the federal constitution, so even if Shawano County failed to abide by Wisconsin law, this would not by itself amount to a violation of Waubanascum's due process rights. *See id.*

No evidence presented at trial indicated that Shawano County knew or even suspected that Fry had a criminal past or would be likely to abuse Waubanascum. Indeed, to the contrary, all of the information and findings that Menominee County made in processing Fry's application (and passed on to Shawano County when it requested a courtesy license) indicated that Fry would make an ideal foster parent. Shawano County witnesses testified that they, too, believed Fry would make an excellent candidate on the basis of that information.

But even if Shawano County should have performed its own background check or otherwise duplicated the work of Menominee County, it is far from clear that the situation would have ended any differently. The evidence at trial indicated that Fry's background check, which was performed by Wisconsin's DOJ, came back clean. No evidence indicated that Menominee County did anything wrong when it requested that the state perform the background check, nor did any evidence show that Shawano County would have gone beyond what Menominee County did in requesting the check. Likewise, it is unclear that the result would have been any different if Shawano County had waited for the return of the clean background check from Wisconsin's DOJ before issuing the foster license. Of course, with the clarity of hindsight, we now know that the criminal background check conducted by the state was inadequate because it excluded a check of criminal convictions outside Wisconsin that would have turned up details of Fry's checkered past in Illinois. But this oversight at most amounts to some species of negligence on the part of Wisconsin's DOJ and, even if it could be laid at the feet of Shawano County, cannot establish the county's liability. *See Lewis*, 308 F.3d at 773 ("Negligence or even gross negligence does not suffice to give rise to liability under § 1983) (citations omitted); *c.f. Kitzman-Kelley v. Warner*, 203 F.3d 454, 462 (7th Cir. 2000) (Posner, C.J., dissenting) (noting that it would be a "fundamental misconception" to conclude "that negligence and deliberate indifference are the same thing").

We have applied the modified deliberate indifference standard to dispose of analogous arguments in cases with similarly tragic facts. In *Lewis*, foster children were placed into an abusive home, and they later sued the state defendants under § 1983. *Lewis*, 308 F.3d at 770. The defendants licensed the foster parents after receiving mostly positive information in the course of their investigation, but also some information that hinted that the applicants might

be unfit. *Id.* at 774-75. We reaffirmed the *K.H.* modified deliberate indifference standard and held that the state defendants were entitled to summary judgment. *Id.* at 775-76. We concluded that the state workers may well have been negligent in performing their background investigation, but they were never alerted to actual abuse or the likelihood of it. *Id.* Thus, the defendants could not be held liable under § 1983. *See id.* at 773 (stating that, pursuant to *K.H.*, the defendants could not "be held liable on the No. 04-3290 15 basis of facts they did not actually know or suspect, even if they might have learned about disqualifying information if they had conducted a more thorough inquiry").

In *J.H.*, the plaintiffs were sexually abused in foster homes selected by a licensed private welfare agency under contract with the Illinois Department of Children and Family Services. *J.H.*, 346 F.3d at 789. The plaintiffs sued several employees of the latter department under § 1983. *Id.* The plaintiffs made an argument similar to Waubanascum's—that the defendants "knew" of the risk of abuse because Illinois law imposed various statutory duties on the state workers regarding licensing of foster homes, and the workers could not delegate its statutory supervisory duties to the contracted agency. *Id.* at 793. We held, however, that the defendants were entitled to summary judgment. *Id.* at 796. There was no evidence that the defendants knew of or suspected abuse, and such knowledge could not be imputed from a statute, nor could "statutorilyimplied" knowledge serve as a substitute for *K.H.*'s requirement of actual knowledge or suspicion. *Id.* at 795-96.

Though the sad facts of this case are not precisely analogous to those in *K.H.*, *J.H.*, or *Lewis*, the same legal principles apply. There was no evidence presented at trial that Shawano County had actual knowledge, or even suspicion, that Waubanascum (or any child) would be at risk in Fry's home. Therefore, under the appropriate legal

standard, the jury could not have found Shawano County deliberately indifferent to Waubanascum's rights. We conclude that no special relationship existed between Shawano County and Waubanascum, and therefore the county had no constitutional duty to Waubanascum on that basis.

B. State-created danger exception

Waubanascum also invokes the second exception to *DeShaney*, under which the state may be liable when it "affirmatively places a particular individual in a position of danger the individual would not otherwise have faced." *Monfils*, 165 F.3d at 516 (quotation and citation omitted). Waubanascum argues that Shawano County, by issuing the license to Fry, "committed an affirmative act that placed Waubanascum in a position of danger that he would not have faced, and subsequently had an opportunity to protect him from that danger." In essence, Waubanascum simply repeats the claim we disposed of above: that Shawano County never should have issued the courtesy license to begin with. Waubanascum also, however, takes issue with Shawano County's actions (or inactions) following the issuance of the license. In particular, Waubanascum contends that the county failed to respond to the sexual assault allegations against Fry leveled by the unnamed student in October 1995. According to Waubanascum, the county knew of these allegations because Deputy Giese notified an unnamed intake worker for the county's department of social services and possibly others in that organization. He also proposes that the county is on the hook "regardless of whether or not Shawano County officials placed the child with its licensee, or knew the specific identity of the child placed in his home." Although Waubanascum contends otherwise, we find the facts of this case to be very similar to those in *Ruiz v. McDonnell*, 299 F.3d 1173 (10th Cir. 2002). In *Ruiz*, the plaintiff's son died while in a licensed day care facility. The

plaintiff brought a § 1983 action against the director and various workers of Colorado's Department of Human Services, alleging that her case fell within the "danger creation" exception. *Id.* at 1182. As the Tenth Circuit noted, "the crux of Ms. Ruiz's claim is that [her son] suffered injuries of constitutional proportions because the State Defendants improperly licensed Tender Heart [Day Care] after failing to conduct an investigation into the facility." *Id.* at 1183.

The Tenth Circuit affirmed the dismissal of the plaintiff's complaint, concluding that the act of granting a license did not impose an immediate risk of harm. *Id.* In addition, the court found it dispositive that the licensure "affected the public at large" and did not target specifically the plaintiff or her child. *See id.* In sum, the court concluded that the plaintiff "failed to allege any affirmative conduct on the part of the State Defendants that created or increased the danger to [the child,]" and therefore failed to state a viable § 1983 claim. *Id.*

We find this reasoning persuasive and applicable in the present case. The evidence at trial revealed that Shawano County did not know who specifically would be placed into Fry's home. Similar to the *Ruiz* court's conclusion, the only conceivable danger created by Shawano County's licensing of Fry would be to the public as a whole (all children eligible to be placed in Fry's home), because the licensure was not "aimed" at Waubanascum specifically. *Cf. Ruiz*, 299 F.3d at 1183 ("Unlike the direct placement of a child into an abusive home, the mere licensure of [the day care facility] was not an act directed at [the child], which, in and of itself placed [the child] in danger."). The evidence clearly established that it was Menominee County, not Shawano County, that placed Waubanascum in Fry's home (in fact, the terms of the license unambiguously indicated that Menominee County would have responsibility for placement of any foster

children in the home). Therefore, the evidence did not support the conclusion that Shawano County affirmatively placed Waubanascum into harm's way when it did not even know of Waubanascum's existence at the time it issued the license to Fry. *See Monfils*, 165 F.3d at 516; *accord Ruiz*, 299 F.3d at 1183.

For similar reasons, Shawano County's failure to act in the wake of the October 1995 accusations does not satisfy the state-created danger exception. Waubanascum asserts that Shawano County was responsible for "monitoring [Fry's] license" and was on notice of the October 1995 allegations, so the county should have removed Waubanascum from Fry's home.

We think Waubanascum reads the danger exception and the evidence too broadly. No evidence indicates that Shawano County was required to "monitor" Fry's license. In fact, as discussed above, the evidence revealed the contrary— Menominee County retained legal custody of Waubanascum and continued to monitor his status in Fry's home under its highest level of supervision, even though Fry's home was located across the Shawano County line.

Regarding the county's notice that Waubanascum may be in danger, the evidence is unclear whether Deputy Giese informed only a low-level intake worker, or additional Shawano County employees as well, of the October 1995 abuse allegations. It is clear, however, that there was no definitive evidence from which the jury could conclude that someone with decision- or policymaking authority at Shawano County received word of the allegations (indeed, the director and deputy director of Shawano County's Department of Social Services both testified that they did not receive word of the allegations until April 1996, after Waubanascum reported Fry's abuse). Nevertheless, the distinction is irrelevant.

Evidence at trial showed that Deputy Giese undertook a criminal inquiry of the matter, which was certainly appropriate. Consistent with his concern for the well-being of foster children that may have been in Fry's custody, the deputy informed Menominee County, which then conducted its own investigation of the allegations and took special steps to question Waubanascum outside the presence of Fry. Even if we assume that responsible persons at Shawano County knew of the allegations and failed to act despite the fact that Menominee County was pursuing its own investigation, this would be insufficient to trigger the exception. As we observed in *Stevens*, "[i]naction by the state in the face of a known danger is not enough to trigger the obligation [to protect private citizens from each other]." *Stevens*, 131 F.3d at 705 (quotation and citation omitted); *see also DeShaney*, 489 U.S. at 203 ("The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them."). Similarly, the evidence introduced in this case is insufficient to satisfy the statecreated danger exception to *DeShaney*, and Waubanascum points us to no authority to support a contrary conclusion.

We remain mindful that "[a]ttacking a jury verdict is a hard row to hoe[,]" particularly in a tragic case like this one. *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1043 (7th Cir. 1999). The evidence before the jury certainly revealed a number of missteps and dropped balls leading to the tragic outcome of this case. But we are equally mindful of the Supreme Court's caution against making "the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states." *Paul v. Davis*, 424 U.S. 693, 701 (1976). As we have already noted, mere negligence does not provide a basis for liability under § 1983, *see Lewis*, 308 F.3d at 773, nor does a violation of state law. *See J.H.*, 346 F.3d at 793. To recover under § 1983, Waubanascum had to show that the county's

actions deprived him of some right to which he is entitled under the federal constitution. He has not done so. An exhaustive review of the record and the trial evidence in the light most favorable to Waubanascum reveals at most negligence or some violation of state law on Shawano County's part. Absent from this evidence are facts supporting the conclusion that Shawano County owed Waubanascum a constitutional duty as defined under controlling caselaw, let alone that the county violated that duty. In sum, the evidence presented to the jury was insufficient to demonstrate that Shawano County deprived Waubanascum of his due process rights, and thus there was not a legally sufficient basis for the jury's verdict.

Shawano County is entitled to judgment as a matter of law, and we need not reach the parties' remaining arguments.

III. Conclusion

Because the evidence introduced at trial was insufficient to demonstrate § 1983 liability on Shawano County's part, we REVERSE the district court's denial of Shawano County's motion for judgment as a matter of law, and VACATE the judgment of the district court entered on the jury's verdict. We REMAND the case to the district court and direct that judgment as a matter of law be entered in Shawano County's favor. The parties shall bear their own costs.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

B-1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
(filed March 9, 2004)

NAQUASEH B. WAUBANASCUM,
Plaintiff, Case No. 01-C-111

v.

SHAWANO COUNTY,
Defendant.

DECISION AND ORDER

Naquaseh Waubanascum is suing Shawano County, Wisconsin for violating his civil-rights while he was in foster care. He is seeking relief pursuant to 42 U.S.C. § 1983.(1) After the close of all discovery, the Defendant moved for summary judgment. See Federal Rule of Civil Procedure 56(c). This matter is now fully briefed.

Summary judgment is appropriate only whe. 'he pleadings, depositions, and other materials in the record demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. See Musser v. Gentiva Health Services, 356 F.3d 751, 760 (7th Cir. 2004). Rule 56 mandates the entry of summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Celotex Corporation v. Catrett, 437 U.S. 317, 322 (1986).

In this case, the Plaintiff has managed to raise an issue of material fact on the dispositive issue of whether Shawano

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(1) All other Defendants which were originally parties to this case have been dismissed.

County had a policy or practice which caused the Plaintiff's injuries. Moreover, the record is insufficient on the issue of the statutory authority of the alleged policymaker. The parties must cite specific Wisconsin law in supporting their positions on that issue.

Therefore, because there are material issues of fact which must be resolved by a jury, the court ORDERS that "Shawano County's Motion for Summary Judgment" (filed October 30, 2003) IS DENIED.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin, this 9th day of March, 2004.

/s/
Thomas J. Curran
United States District Judge

C-1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
(filed August 24, 2004)

NAQUASEH B. WAUBANASCUM,
Plaintiff, Case No. 01-C-111

v.

SHAWANO COUNTY,
Defendant.

DECISION AND ORDER

Defendant Shawano County has moved the court for judgment as a matter of law or, alternatively, for a new trial. See Federal Rules of Civil Procedure 50 & 59(a). The motion follows a May 13, 2004, jury verdict finding that Shawano County had a policy or custom of issuing courtesy foster care licenses (1) without undertaking any investigation before or after a license was issued and that Shawano County carried out its policy with deliberate indifference to the rights of the Plaintiff, Naquaseh Waubanascum. The jury awarded Waubanascum a total of $175,000.00 in damages.

Despite the verdict in favor of the Plaintiff, Shawano County argues that the court should grant judgment in its favor as a matter of law for the following reasons:

1. The evidence at trial affirmatively demonstrated that Shawano County did not owe a duty to the Plaintiff under the Due Process Clause as required in DeShaney v. Winnebago County Social Services, 489 U.S. 189, 197-98 (1989).

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(1) Evidence presented at trial showed that a courtesy foster care license is a license issued without investigation by one county at the request of another county.

2. As a matter of law, Shawano County is not liable under 42 U.S.C. § 1983 for issuing a courtesy foster care license to Menomonee County because:

> (a) The evidence did not demonstrate that Shawano County had a policy that was unconstitutional on its face.
>
> (b) The evidence did not demonstrate that Shawano County had a custom which caused a constitutional violation.
>
> (c) The evidence did not demonstrate that a constitutional deprivation resulted from a single decision by a person with final policy making authority.

3. The Plaintiff cannot show an unconstitutional policy through evidence of conduct by low-level county employees after the license was issued.

In the alternative, the Defendant asks for a new trial due to the following trial rulings:

1. The court erred in failing to instruct the jury that there was no *respondeat superior* liability.

2. The evidence of conduct after the license was issued was not relevant and should not have been admitted.

3. The evidence of Menomonee County's settlement with the Plaintiff should have been admitted.

Brief in Support of Its Motion for Shawano County's Motion for Judgment as a Matter of law or Alternatively, for A New Trial at 2-13.

I. MOTION FOR JUDGMENT AS A MATTER OF LAW

The Defendant has renewed its motion for judgment as a matter of law which was made at the close of all evidence. See Federal Rule of Civil Procedure 50(b). The Defendant says that the grounds raised here are precisely the same as the grounds it raised in its previous motion, although the Defendant has not submitted portions of the transcript to support this assertion.

In ruling on a motion made pursuant to Federal Rule of Civil Procedure 50(b), a district court must decide whether there is sufficient evidence in the record upon which the jury properly could find a verdict for the Plaintiff. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150 (2000). In determining whether the evidence presented at trial is sufficient to withstand a motion for judgment as a matter of law, the district court is not free to weigh the parties' evidence, or to pass on the credibility of witnesses, or to substitute its judgment of the facts for that of the jury. See Tart v. Illinois Power Company, 366 F.3d 461, 472 (7th Cir. 2004). The court must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences that may be drawn from the evidence. See 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Civil § 2524 (2d ed. 1995).

The court can disregard all evidence favorable to the moving party that the jury is not required to believe. See Reeves, 530 U.S. at 151. In the end, the court must be assured that it was presented with a legally sufficient basis to support the verdict. See Massey v. Blue Cross-Blue Shield of Illinois, 226 F.3d 922, 924 (7th Cir. 2000).

A. DUTY

First, the Defendant argues that, even though it licensed the foster home in Shawano County where Waubanascum was placed, Shawano County did not have a duty to Plaintiff Waubanascum to investigate potential foster parents because Waubanascum was in the custody of Menomonee County. In his response to the post judgment motions, The Plaintiff says that Wisconsin laws and regulations received into evidence at trial (but not identified by the Plaintiff by name, number, or exhibit number) establish that Shawano County had a duty toward all Wisconsin children in foster custody who might be placed in foster homes in Shawano County.

As explained at trial, the court agrees with the Plaintiff. The Introduction to Chapter HSS 56 of the Wisconsin Administrative Code (Trial Exhibit 1006) states that:

> (1) PURPOSE. The purpose of this chapter is to protect the health, safety and welfare of children placed in foster homes. . . .

Because Naquaseh Waubanascum was a child placed in a foster home a special relationship existed between him and the State of Wisconsin and its subdivisions. Therefore, Shawano County had a duty to protect him under DeShaney v. Winnebaao County Social Services Department of Social Services, 489 U.S. 189, 197-98 (1989), so judgment as a matter of law will not be granted to the Defendant on this ground.

B. POLICY CUSTOM

Next, the Defendant argues that the evidence did not establish that Shawano County had a policy that was unconstitutional on its face or that resulted from a single decision by a person with final policy making authority. This argument misstates the law governing local government liability. It is well-established that a county can be held liable

to a plaintiff deprived of a federal right as a result of: (1) an express municipal policy; or (2) a widespread custom; or (3) a deliberate act of a decision-maker with final policy-making authority. See Ienco v. City of Chicago, 286 F.3d 994, 997-98 (7th Cir.), cert. denied sub nom. Angarone v. Ienco, 537 U.S 1028 (2002). Although the policy of granting courtesy foster home licenses is not found in state law, a preponderance of the evidence admitted at trial established that Shawano County had a long-standing custom of granting the courtesy licences without conducting investigations of the applicants and that this custom was authorized by Shawano County's policy-making official. Therefore, it was unnecessary for the Plaintiff to prove an alternative basis for liability-that a policy resulted from a single decision by a person with final policy-making authority. Likewise, it was unnecessary for the Plaintiff to prove that the policy was unconstitutional on its face. The Plaintiff proved that the policy was unconstitutional as applied to him.

The Defendant also argues that the evidence did not demonstrate that Shawano County had a custom which caused a constitutional violation, but the jury disagreed. The court will not overturn the jury finding because sufficient evidence was received at trial which showed that Shawano County's custom of issuing courtesy licenses without investigation led to the placing of the Plaintiff with a foster parent who was later found to have a criminal record and who caused injury to the Plaintiff.

C. KNOWLEDGE

Shawano County recounts that it was not until after the Plaintiff was placed in the licensed home of Mark Fry that a low level county employee learned of the foster father's criminal record. The County argues that, because there is no evidence that a policy-making county official was informed, Shawano County cannot be held liable.

As explained above, the Plaintiff established by sufficient evidence that Shawano County had an unwritten policy of granting courtesy foster home licenses without investigating the potential licensee. Although the general rule requires that a Defendant have knowledge of a specific risk in order to be found deliberately indifferent to a constitutional right(2), in this particular case the policy of not conducting an investigation insured that the Defendant would not have knowledge of a potential foster parent's criminal history background. Shawano County's policy was one of omission of a procedure which could lead to knowledge of a specific risk to a child in foster care. At trial, Ronald Stuber, who was proven to be a final policy maker for Shawano County, testified that children are threatened with danger when adequate background checks of prospective foster parents are not conducted. Thus, in this case, the Defendant cannot be absolved of liability for lack of knowledge at the policy-making level. Cf. City of Canton v. Harris, 489 U.S. 378 (1989).

II. MOTION FOR NEW TRIAL

1. *Jury Instruction*

In the alternative, Shawano County has moved the court to grant it a new trial pursuant to Federal Rule of Civil Procedure 59 in order to correct manifest errors of law. Shawano County's first ground for a new trial is that the court erred when it refused to instruct the jury of the definition of *respondeat superior* liability. The County says that, "without this instruction, the jury could not possibly have known that they could not find liability against Shawano County based solely on the conduct of Officer Giese and the intake worker." Shawano County's Brief in Support of Its Motion for Judgment as a Mater of Law or Alternatively, for a New Trial at 12.

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(2) See, e.g., Butera v Coffey, 284 F.3d 601, 605-06 (7th Cir. 2002).

When a party is requesting a new trial based on erroneous jury instructions, the party must show that: (1) the instruction did not adequately state Seventh Circuit law; and (2) the party was prejudiced by the error because the jury was likely confused or misled. See Susan Wakeen Doll Company, Inc. v. Ashton-Drake Galleries, 272 F.3d 452, 454-55 (7th Cir. 2001). An erroneous jury instruction cannot be found to be prejudicial unless, considering the instruction as a whole, along with all of the evidence and arguments, the jury was misinformed about the applicable law. See Id.

The Plaintiff's theory of liability was that a policy and practice of Shawano County led to his abuse at the hands of his foster father. The court did not give the proffered *respondeat superior* instruction because it was not directly relevant to this theory and, injecting this Latin phrase and technical definition into the instructions, would have led to jury confusion. The Defendant's speculation that the jury might have decided the case differently if given the *respondeat superior* instruction is insufficient to establish prejudice. The court concludes that the absence of a *respondeat superior* jury instruction was not prejudicial in light of the charge as a whole. The Defendant has cited no case establishing that the Seventh Circuit requires that a *respondeat superior* instruction be given under these circumstances and the movant has not persuaded the court that the jury was misinformed about the applicable law. Moreover, the Defendant has not demonstrated that any of the other instructions were ambiguous or suggested that the jury might find Shawano County liable on the basis of a *respondeat superior* theory. See Perry v. Ethan Allen, Inc., 115 F.3d 143, 152-53 (2d Cir. 1997). Therefore, the court will not grant a new trial on this ground.

2. Evidentiary Rulings

The Defendant's two remaining grounds for seeking a new trial involve evidentiary rulings. Even if an evidentiary error is made at trial, a new trial is warranted only where the error has caused substantial prejudice or resulted in substantial injustice to the affected party. The court must ask how much of an effect the improperly admitted or excluded evidence had on the verdict. See Woodward v. Correctional Medical Services of Illinois, Inc., 368 F.3d 917, 929 (7th Cir. 2004). To answer this question, courts have looked at a number of factors, including: the number of errors; the closeness of the factual disputes; the prejudicial effect of the evidence at issue; whether counsel intentionally elicited the evidence; whether counsel focused on the evidence during the trial; and, whether any cautionary or limiting instructions were given. See Peat, Inc., v. Vanguard Research, Incorporated, 2004 WL 1627025 (11th Cir. 2004) No. 03-11565.

First, the Defendant contends that evidence of conduct after Shawano County granted the foster care license at issue was not relevant and should not have been admitted. This evidence showed that, after Shawano County granted the foster care license to Mark Fry who later became the foster father of the Plaintiff, Shawano Deputy Sheriff Randall Giese investigated an abuse complaint against Fry involving another child. He found that Fry had a history of involvement with the criminal justice system in Illinois. He says that he then informed an unnamed intake worker at Shawano County Social Services of Fry's record.

The court admitted this evidence because it is relevant to showing Shawano County's policy of not investigating persons issued courtesy foster home licenses. The Defendant points out that neither Deputy Giese nor the unnamed intake worker notified any policy maker of the complaint against Fry. From this, the jury could infer that the County had no

procedures or requirements for such notification. The court finds that admitting this evidence did not result in substantial injustice to the Defendant. Therefore, a new trial will not be granted on this basis.

Finally, the movant maintains that evidence of Menomonee County's(3) settlement with the Plaintiff should have been admitted to show the bias of an expert witness and to dispute the Plaintiff's claim that he was not receiving medical treatment because he did not have any money. Federal Rule of Evidence 408 is grounded on the policy of encouraging the settlement of disputes without resort to trial. Although settlement can be admitted to show bias, it must be weighed with great caution. A court considering the admissibility of settlement evidence, for impeachment purposes, must reconcile the tension between two important policies: encouraging settlement of disputes and accommodating the truth-finding process to the assessment of a witnesses' credibility. In this case, the Plaintiff's expert witness was cross examined extensively and effectively about her prior opinions. Through her earlier reports and deposition testimony, counsel was able to establish conflicting opinions reached, without reference to the settlement. The incentive to settle cases in which a number of parties were involved would be undermined if the settlement with one could come back to haunt him in pursuing his litigation. There is also the danger that the jury could conclude that the Plaintiff had been compensated for his injury and that one or more of the Defendants would not have paid, unless they felt that they were at fault. The settlement of the claim may be motivated by a desire to "buy peace" or avoid further expense rather than an acknowledgment of the validity of the claim.

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(3) Menomonee County was dismissed as a party Defendant to this lawsuit by this court's Order of February 18, 2004.

The court also excluded the amount of the settlement with the other Defendants because it would require the court to permit the Plaintiff to come forward with evidence relating to the disposition of the settlement funds. In addition to the attorney fees, it is not unlikely that Menomonee County and, for that matter *I* Shawano County *I* may well have imposed liens on the funds to repay them for the monies expended on Plaintiff's behalf and other liens that might have been asserted against such fund. The likelihood that some, or all of the funds, were placed in trust for the Plaintiff's benefit would cause the jury to speculate as to how or if such funds could be released. The court ruled against admitting the settlement agreement between Waubanascum and the other Defendants because the interest in admitting the settlement and the amount of the settlement was outweighed by the likelihood of unfairly prejudicing the Plaintiff and confusing the jury. Revealing the amount received in the settlement would not necessarily establish that Waubanascum had sufficient funds to seek medical treatment. Consequently, the court will not grant a new trial on this ground.

ORDER

For the reasons explained above, the court **ORDERS** that "Shawano County's Motion for Judgment as a Matter of Law or Alternatively, for a New Trial" (filed May 25, 2004) **IS DENIED**.

IT IS FURTHER ORDERED that the Clerk of Court shall amend the judgment entered on May 13, 2004 to add that:

IT IS FURTHER ORDERED AND ADJUDGED that Defendant Shawano County's Motion for Judgment as a Matter of Law or Alternatively, for a New Trial is denied.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin, this 24th day of August, 2004.

/s/
THOMAS J. CURRAN
United States District Judge

D-1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
(filed August 24, 2004)

NAQUASEH B. WAUBANASCUM,
Plaintiff, Case No. 01-C-111

v.

SHAWANO COUNTY,
Defendant.

DECISION

The Plaintiff has moved the court for an award of attorney fees pursuant to Rule 54 of the Federal Rules of Civil Procedure and 42 U.S.C. § 1988, following the return of a jury verdict in his favor.

The awarding of attorney fees under 42 U.S.C. § 1983 is governed by 42 U.S.C. § 1988, which authorizes such awards to a prevailing party. See Alliance to End Repression v. City of Chicago, 356 F.3d 767, 769 (7th Cir. 2004). District courts have wide discretion in determining the appropriate amount of attorney fees and costs.

BACKGROUND

The district court must first determine the number of hours reasonably expended on the matter. Hours that relate to matters not involving the Defendant Shawano County cannot properly be billed to the County. Plaintiff's counsel claims that he has excluded all charges attributable to the other two defendants who were originally parties to this action but settled out following mediation.

The Defendant Shawano County asks the court to reduce the number of hours further, raising two objections-first, that the Plaintiff did not adequately reduce fees for time spent prosecuting the claims against the other Defendants and, second, that the Plaintiff has not produced adequate documentation for what it calls "research fees."

It is undisputed that this lawsuit began on June 16, 2000, when the Plaintiff retained Plaintiff's counsel. The complaint was filed on January 30, 2001, naming as Defendants the Menomonee Indian School District, Menomonee County, and Shawano County. As stated above, the Menomonee Indian School District and Menomonee County settled with Plaintiff on November 19, 2003, as a result of mediation. The trial began on May 10, 2004, and the verdict was returned on May 14, 2004. The motion requests fees in the amount of $91,908.50.

DISCUSSION

The Plaintiff alleges that the total fees incurred amounted to $102,040.00. From that, Plaintiff deducted the sum of $10,131.50 for fees specifically incurred to prosecute the Plaintiff's claims against the settling Defendants. It argues that prior to the settlement, "fees were incurred for tasks relating to procedural matters which, for the most part, would have been incurred if there were one or three defendants." Plaintiff does not identify these "procedural matters" nor, for that matter, does he point out the items used to arrive at the deduction of $10,131.50. The district court must determine whether the hours claimed to have been expended on the fee request bear a rational relationship to the number of hours spent litigating the merits of the claim against Shawano County. The fee applicant bears the burden of documenting the appropriate hours and hourly rates to the satisfaction of the district court. See Tomazzoli v. Sheedy, 804 F.2d 93,96 (7th Cir. 1986).

The Defendant argues that the Plaintiff's request for attorney fees should be reduced by two-thirds to reflect the fees incurred in pursuing Menomonee County and the Menomonee Indian School District. Shawano County requests that this court exercise its discretion and reduce the amount of fees based on the vague time descriptions, and because of the inadequate documentation. Like the Plaintiff, the Defendant does not identify which charges it is challenging. The invoices set forth the time spent on each entry so the challenge based on vagueness of time is not supported by the submissions. A review of the docket sheet reveals that of the 112 entries, 56 related to matters occurring prior to November 19, 2003. The remaining 56 entries all related to filings after that date. Thus, to apply the two-third reduction suggested by Defendant, would be unreasonable and not supported by the record.

The fees sought for work done on and after November 19, 2003, relate solely to the claim against Shawano County. The total of those claimed fees amount to $46,556.00 and should be separated from the total fees claimed of $102,040.00, leaving a balance of $55,484.00.

Plaintiff's counsel concedes that most of the work prior to May of 2003, related to Plaintiff's claims against all three Defendants. After May, 2003, Plaintiff's counsel asserts that most of the fees related to the depositions which included attorneys for all three Defendants. Without the assistance of counsel, this court is unable to determine which depositions, if any, relate solely to Shawano County and, therefore, must assume that up to November 19, 2003, the depositions related to all three Defendants and will attribute one-third of the fees incurred up to November 19, 2003, to each Defendant.

CONCLUSION

The Defendant does not challenge the hourly rate charged by Plaintiff's counsel and the court will determine that the "market value" of Plaintiff's attorney fees is reasonable. As set forth above, the Plaintiff is entitled to recover attorney fees incurred on or after November 19, 2003, in the amount of $46.556.00, together with one-third of the fees incurred between June 16, 2000 and November 19, 2003, in the amount of $18,495.00, for a total of $65,051.00.

Plaintiff's counsel has filed a motion for a supplemental award of attorney fees. Counsel seeks payment for fees incurred in responding to the Defendant's motions after verdict. Defendant has indicated that it does not have any specific objections to the amount sought in the supplemental motion. Therefore, the court finds that the sum of $4,208.50 sought by Plaintiff's counsel is reasonable and necessary for the adequate representation of Plaintiff's interest subsequent to the trial. Accordingly,

For the reasons explained above, the court **ORDERS** that the Plaintiff's "Motion for Attorney Fees" (filed May 26, 2004) **IS GRANTED IN PART AND DENIED IN PART.** The court orders the Defendant to pay the Plaintiff the sum of Sixty-Five Thousand Fifty-One Dollars and No Cents ($65,051.00).

IT IS FURTHER ORDERED that the plaintiff's additional "Motion for Attorney Fees" (filed June 21, 2004) **IS GRANTED.** The court orders the Defendant to pay the Plaintiff the sum of Four Thousand Two Hundred Eight Dollars and Fifty Cents ($4,208.50) as additional attorney fees.

The total amount of attorney fees awarded to the Plaintiff is Sixty-Nine Thousand Two Hundred Fifty-Nine Dollars and Fifty Cents ($69,259.50).

IT IS FURTHER ORDERED that the Clerk of Court shall enter an amended judgment as a separate document. See Federal Rule of Civil Procedure 58. This amended judgment shall provide that:

IT IS ORDERED AND ADJUDGED that Plaintiff Naquaseh B. Waubanascum recover of the Defendant Shawano County the sum of One Hundred Seventy-Five Thousand Dollars and No Cents ($175,000.00) with interest thereon at the rate as provided by law and his costs of this action.

IT IS FURTHER ORDERED AND ADJUDGED that this action is **DISMISSED** upon its merits.

IT IS FURTHER ORDERED AND ADJUDGED that the Defendant shall pay the Plaintiff the total sum of Sixty-Nine Thousand Two Hundred Fifty-Nine Dollars and Fifty Cents ($69,259.50) as attorney fees.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin, the 24th day of August, 2004.

BY THE COURT:

_____/S/
Thomas J. Curran
United States District Judge

WISCONSIN ADMINISTRATIVE CODE

CHAPTER HSS 56
FOSTER HOME CARE FOR CHILDREN
(September 1990)

RELEVANT PROVISIONS

HSS 56.01 INTRODUCTION. (1) PURPOSE. The purpose of this chapter is to protect the health, safety and welfare of children placed in foster homes. The chapter established the qualifications and responsibilities of foster parents, the size and condition of the foster home and the essential components of care which must be provided to each foster child. Although children in need of foster care may not be placed in a home that is not licensed under this chapter, a license to operate a foster home does not entitle the holder to placements.

(2) STATUTORY AUTHORITY. This chapter is promulgated under the authority of s. 48.67(1), Stats., to carry out licensing requirements under ss. 48.48(9), 48.57(1)(i), 48.61(7), 48.62, 48.66 and 48.75, Stats., to establish a fair hearing procedure under s. 48.675, Stats., and to establish criteria for supplemental payments to foster parents under s. 49.19(12), Stats.

(3) TO WHOM THE RULES APPLY. Except as provided in sub. (4), all requirements contained in this chapter shall be met by all persons required to be licensed under s. 48.62, Stats.

(4) EXCEPTION TO RULES. (a) A licensing agency may grant an exception to any requirement in this chapter if the licensing agency determines that the exception will not jeopardize the health, safety or welfare of the foster children, except that no exception may be granted to any of the following requirements: ss. HSS 56.01; HSS 56.02; HSS

56.03(1), (2), (4)(a)1 to 5 and 8 and (b)2, and (6); HSS 56.04 (l)(a) and (b)2 to 7 and 9, (2), (4m) and (6)(a); HSS 56.05(3)(a), (4) (b), (c) and (e) to (h), (5) (a) and (c), (6) and (10)(8); HSS 56.06(1)(8) and (b), (2), (3), (4), (5), (6)(c), (7)(a), (8) and (10); HSS 56.07(1), (2)(c), (3), (4)(c), (5)(8) to (i), (9)(8) and (b), (10) and (11); and HSS 56.09.

(b) An applicant or licensee wanting to ask the licensing agency to grant an exception to a requirement in this chapter shall submit the request in writing, stating the specific provision of this chapter for which an exception is requested, the justification for the requested exception and an explanation of any alternative provisions planned to meet the intent of the requirement.

(c) Any exception granted under par. (a) shall be specifically cited on the license and shall be in effect no longer than 2 years from the date on which the exception is granted by which time the licensing agency shall determine if there is continued justification for the exception. In addition, the licensing agency may impose conditions to be met within a specified period of time by the licensee as an alternative to compliance with any requirement for which an exception has been granted.

(d) Any requirement which reads "if required by the licensing agency" shall be met by an applicant or licensee when the licensing agency requires the applicant or licensee to meet that requirement.

HSS 56.02 DEFINITIONS. In this chapter:

(1) "Applicant" means a person who applies for a license to operate a foster home, for renewal of a license to operate a foster home or for modification of a license to operate a foster home.

...

4) "Child" means a person under age 18 years of age.

...

(8) "County agency" means a county department of social services under s. 46.215 or 46.22, Stats., or a county department of human services under s. 46.23, Stats.

...

(11) "Foster child" means a child placed for care and maintenance in a foster home by the department, a county agency, a child welfare agency or a court.

(12) "Foster home" means any facility operated by a person required to be licensed under s. 48.62, Stats., that provides care and maintenance for no more than 4 foster children unless all the children are siblings.

(13) "Foster parent" means a person with primary responsibility for the care and supervision of one or more foster children placed in his or her home and who is the person or persons referred to as "licensee" in this chapter.

...

(18) "Licensee" means a person or persons licensed under s.48.62, Stats., and this chapter to operate a foster home.

(19) "Licensing agency" means the department, a county agency or a child welfare agency.

...

HSS 56.03 APPLYING FOR A LICENSE. (1) WHO MUST APPLY. Anyone proposing to provide foster care for children shall apply to a licensing agency for a foster home license. Application shall be made on a form provided by the licensing agency.

(2) LICENSE PROHIBITION. No licensing agency or any of its contracted or subcontracted agencies may issue a foster home license to one of its own employees.

(3) REAPPLICATION FOLLOWING DENIAL OR REVOCATION. No applicant or former licensee previously denied a license or whose license was revoked may reapply for a license within a period of 2 years following the effective date of licensing denial or revocation.

(4) DOCUMENTS REQUIRED PRIOR TO LICENSING.
(a) Initial license. Before an applicant for an initial license may be issued a license, the applicant shall submit the following to the licensing agency:

1. An application form completed and signed by the applicant. Married persons living together shall both sign the application;

2. Written authorization for the licensing agency to contact the department of justice or any federal or local law enforcement agency to determine whether the applicant is unqualified to receive a license for any reason specified under s. HSS 56.04(4m) (b);

3. Verification of homeowner's or renter's and vehicle liability insurance coverage required under s. HSS 56.04(5) and (6) or a request for a waiver in accordance with s. HSS 56.04(7). Verification means that the licensing agency representative has personally seen the appropriate documentation. A licensing agency need not retain a copy in its files;

4. Health examination documentation for all household members;

5. References from at least 3 nonrelatives;

6. Documentation of fire safety inspection, if required by the licensing agency;

7. A private water supply test report, if required by the licensing agency;

8. The employment history of the applicant; and

9. Other documentation or authorizations required by the licensing agency for its review of the application.

...

(5) ACTION BY THE LICENSING AGENCY. Within 60 days after receiving a complete application for a foster home license, the licensing agency shall either approve the application and issue the license or deny the application If the application for a license is denied, the licensing agency shall give the applicant reasons in writing for the denial.

(6) EFFECTIVE PERIOD OF A LICENSE. A foster home license shall be effective for a period not to exceed two years and may be renewed.

HSS 56.04 LICENSEE OUALIFICATIONS. (1) GENERAL REQUIREMENTS. (a) A person licensed to operate a foster home shall be a responsible, mature individual who is fit and qualified, who does not abuse alcohol or drugs or have a history of law violations that substantially relate to operating a foster home and who exercises sound judgment and displays the capacity to successfully nurture foster children. The applicant or licensee shall give truthful and sufficient information to enable the licensing agency to verify whether or not he or she meets these requirements. Giving false information or withholding information shall constitute grounds for denial or revocation of the license.

(b) The licensee shall:

1. Be familiar with this chapter and comply with its requirements;

2. Accept foster children for care only in conformity with the conditions specified on the license;

3. Cooperate fully with the licensing agency and any other agency responsible for supervising foster children in the licensee's care and to keep the licensing agency and any other responsible agency informed of each child's progress and problems;

4. Immediately notify the licensing agency of any change in the job of the foster parent who works outs1de the home and any change in the work schedule of the foster parent who works outs1de the home. The licensing agency shall assess the impact these changes will have on the 1icensee's ability to provide foster care.

5. Immediately notify the supervising agency of any life-threatening or serious illness or injury requiring medical treatment for a foster child, the unauthorized absences of a foster child from the home for longer than 8 hours or for a period of time that cannot reasonably be justified by the child's age, maturity or mental and emotional capacity, or any similar crisis related to a foster child;

6. Secure authorization of the supervising agency before taking a foster child our of state for a period longer than 24 hours;

7. Cooperate with efforts of the supervising agency to maintain relationships between foster children and their families and with the agency's efforts to implement plans for care and treatment and for arranging permanency of care as required under s. 48.38, Stats;

8. Allow the supervising agency up to 30 days in which to make alternate placement plans when the licensee asks that a foster child be removed from the home; and

9. Maintain in confidence all personal information about foster children and their families.

...

(4) HEALTH. (a) A person licensed to operate a foster home shall be in good health.

(b) The good health of an applicant for an initial license to operate a foster home shall be documented by the applicant presenting to the licensing agency a written statement from a physician that, based upon a medical examination performed within the previous 6 months, the applicant does not have any illness or disability that is likely to threaten the health of foster children or interfere with the applicant's capacity to provide care.

(c) If, at any time, the licensing agency suspects or has reason to believe that the physical or mental health of an applicant, licensee or other household member may pose a threat to the health, safety or welfare of children in care, the licensing agency may require an alcohol and other drug abuse assessment or physical health or mental health evaluation of the person as a condition for licensing or relicensing.

(4m) CRIMINAL RECORD. (a) Before a foster home license is issued or renewed, the applicant for a license or foster parent applying for renewal of a license shall provide written authorization for the licensing agency to contact the department of justice and federal and local law enforcement agencies to determine whether the applicant is unqualified to receive a new license or have an existing license renewed for any reason specified in par. (b).

(b) An applicant or licensee is unqualified to hold a license if the applicant or any other adult living in the household:

1. Is the subject of a pending state or federal criminal charge if the circumstances of the charge substantially relate to caring for children or operating a foster home; or

2. Has been convicted of a felony, misdemeanor or other state or federal offense, the circumstances of which substantially relate to caring for children or operating a foster home.

...

HSS 56.07 CARE OF FOSTER CHILDREN. (1) PRINCIPLES FOR HUMANE AND NURTURING CARE. The foster parents shall provide humane and nurturing care to each child placed in the foster home. This is care that:

(a) Ensures that the child is provided a humane physical and psychological environment;

(b) Is respectful of the child as a person;

...

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

NAHQUASEH B. WAUBANASCUM,
Plaintiff,

vs. Case No. 01-C-111

SHAWANO COUNTY, JURY TRIAL
Defendant.

VOLUME 1
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE THOMAS J. CURRAN,
UNITED STATES DISTRICT JUDGE, AND A JURY

Milwaukee, Wisconsin
May 10, 2004
9:30 a.m.

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

...

THE WITNESS: Richard Kane, K A N E.

DIRECT EXAMINATION

BY MR. GERBERS:

Q. Good afternoon, Mr. Kane. Would you please state your present address?

A. Home or --

Q. Business is fine.

A. 607 East Elizabeth, Shawano, Wisconsin.

Q. And your occupation?

A. I'm the Deputy Director for Social Services.

Q. Shawano County?

A. Correct.

Q. How long have you held that position?

A. Eight or nine years.

Q. Have you held that position in 1995 at the time that a foster home license was issued to one Mark Fry?

A. Correct.

Q. As part of your duties, Mr. Kane, you're aware of the statutes concerning the issuance of foster care licenses; is that true?

A. I am.

Q. Mr. Kane, I'm showing you what has been marked as Exhibit Number 2, which is the HSS 56 foster care -- foster home care for children. Is that correct?

A. That's correct.

Q. That is a provision under the Wisconsin Administrative Code?

A. Yes.

Q. And that's law here in the State of Wisconsin?

A. That's correct.

Q. And the particular edition that you have here September of

1990, which would have been in effect at the time in 1995?
A. Correct.

...

A. Permitting who to do an investigation about what?
Q. Let me just rephrase the question. Are you familiar with
HSS 56.04 of the Administrative Code?
A. I can't reference this thing, you know, verbatim, but I am
familiar with it.
Q. You're familiar with the information that an applicant is
supposed to get to the licensing agency so that you can take a
look at that information?
A. Correct.
Q. Showing you part of HSS 56 concerning those specific
provisions.
First of all, it indicates with respect to criminal
records that before a foster home license is issued or renewed,
that they have to provide written authorization for the
licensing agency to contact the Department of Justice and
federal and local law enforcement agencies to determine whether
or not that applicant is qualified or unqualified to receive a
license. Is that true?
A. Correct.
Q. Who was the licensing agency in this case?
A. Shawano County.

...

Q. Nor did you receive any type of employment history from
Mr. Fry, only the home care study.
A. Correct.

Q. You never spoke with Mr. Fry?
A. That's correct.
Q. In fact, the truth of the matter is, you didn't have anything other than the two pages that are over to your left; is that correct?
A. That is correct.
Q. Now, there's been talk by your counsel in his opening statement that Mr. Fry supposedly had some glowing recommendations and so forth from the school that he had come from. The truth of the matter is, you didn't have those available anyway at the time that this license was issued, true?
A. That's correct.
Q. Now, Mr. Kane, it's my understanding that, what we heard Mr. Bohl indicate in his opening statement, that in this particular instance Shawano County relied upon another county to basically conduct the necessary searches, get the employment history, and those items that are specifically delegated to Shawano County in this instance under the Administrative Code.
Is that true?
A. It was implied they would do that.
Q. There is no provision in the Wisconsin Administrative Code for that, is there?

A. I'm not sure.
Q. Now, even if you did that, Mr. Kane, as we look here you could tell that references and background checks have been

placed in the file upon receipt. Correct?
A. Correct.
Q. Did you have those background checks before you actually
issued the license?
A. I believe they were done.
Q. Did you have them?
A. No.
Q. This license was issued by Mr. Stuber without any knowledge
as to what the contents of any background search were; is that
true?
A. I don't know. I'm assuming yes.
Q. So it was implied at least in your mind that those
particular things would be taken care of my Menominee County.
A. Correct.
Q. However, you personally would not recommend the issuance of
a license unless that background check had been completed,
correct?
A. That is correct.
Q. Did you ever request any employment verification from
Mr. Fry?
A. No.
Q. Do you know if anyone from your agency did?

A. I am not sure.
Q. At the time of licensing you knew that Mr. Fry had about two
years under his belt at Menominee High School and 10 years in
the Chicago cities area with another school, true?
A. True.

Q. You didn't contact any of the schools or anything, though, did you?
A. I had no reason to.
THE COURT: Is that a no?
THE WITNESS: No.
BY MR. GERBERS:
Q. Is it a true statement that upon the issuance of the license your department took no further action with respect to monitoring that license?
A. That's correct.

...

Q. In fact, you recall being asked at the time of your deposition that if when he made his application for a foster home license you knew what he engaged in in Illinois, he never would have been issued a foster license.
A. That's correct.

Q. Your statement was "absolutely not?" Is that correct?
A. I don't follow --
Q. I asked you if he would have been issued a foster license if you knew the information?
A. If we would have known the information about Mr. Fry's past?
Q. Right.
A. We would not have issued him a license.
Q. In this particular instance you reviewed the home study and made a recommendation to Mr. Stuber your director that that license be issued. Correct?
A. Correct.

Q. It's my understanding Mr. Stuber as the director decides whether or not a license is issued?
A. That's correct.
Q. He has final authority on that?
A. Correct.

...

A. I can't find that immediately.
Q. Is it in there?
A. I'm assuming it is.
Q. Well, I'm going to give you the time to look through it. I don't mean to do it to the jury, but I want you to -- I think you have the original exhibit there. I want to see in the Administrative Code, Mr. Kane, where it says that the licensing agency has the ability to assign its obligations to another county.
(Witness peruses document.)
A. Can't find it.
Q. I didn't expect that you would, Mr. Kane.
With respect to the other issue with the references all look good, you didn't have the references when you issued this license, did you?
A. No.
Q. You also said the background check had been taken care of. In fact, you later found out well after this case had started, that that background check was done after your license was issued and only in the State of Wisconsin. True?
A. I'm not sure where it was done.
Q. Bottom line is you didn't have it before you issued the license, did you?

24 A. No. I thought it was in the file.

...

16 THE WITNESS: Ronald N. Stuber, S T U B E R.
17 DIRECT EXAMINATION
18 BY MR. GERBERS:
19 Q. Mr. Stuber, would you please tell us your business address?
20 A. 607 East Elizabeth Street, Shawano, Wisconsin.
21 Q. And your occupation, sir?
22 A. I'm the Director of Social Services.
23 Q. And you've held that position for how long?
24 A. About 18 years.

...

1 when a foster care license was issued to Mr. Mark Fry?
2 A. Yes, I did.
3 Q. There has been admitted into evidence in this particular
4 case an exhibit that might be easiest to look at, Exhibit 105A,
5 which is the foster home license. Is that correct?
6 A. I assume so. I see the foster home license here.
7 Q. Is that your signature which appears on that?
8 A. Yes, it is.
9 Q. That document gave Mr. Fry the legal authority to have
10 children placed in his home; is that true?
11 A. That's correct.
12 Q. Consistent with what I understand to be past practices and
13 the policy of Shawano County, as testified to by Mr. Kane, you
14 issued this license without conducting the licensing
15 requirements specified in HSS 56. Is that true?
16 A. I relied on Menominee County's report, that's correct.
17 Q. So the answer to my question was yes, correct?
18 A. Would you repeat the question?

MR. GERBERS: If we could have the court reporter read it back, please.

(Record read.)

THE WITNESS: I did not conduct any investigation.

BY MR. GERBERS:

Q. So the answer to the question is yes?

A. Is yes.

...

Q. Okay. You don't dispute the fact that you were the licensing agency, correct?

A. That's correct.

Q. In fact, on the license that I see there it specifically says that, Mark Fry, having been found to be in substantial compliance with HSS 56, true? Very top line?

A. That's part of the license, correct.

Q. That is something that you're certifying by signing your name to that document, correct?

A. That's correct.

Q. You did that upon the recommendation of your staff, Mr. Kane?

A. That's correct.

Q. And the only document that you had available to you was the foster home study that we've identified in this case as Exhibit Number 1, correct?

A. That's correct.

Q. You also did not have any criminal background information, work history, or anything of that nature, correct?

A. I did not, no.

Q. Now, it's my understanding a home study would typically

contain the results of a background check whether it was done by
you or someone else, true?
A. Would typically contain it?
Q. It would contain a criminal background.

A. It would contain the requirements, that's correct, of a background check or a criminal check that would be done.
Q. In this particular case you didn't have that information at
the time --
A. I did not have the results of that no, I did not.
Q. And you also had no information regarding his employment.
Is that true?
A. Other than what would have been contained in the study, no.
Q. I think we've established that all that you and Mr. Kane
reviewed before that issue was licensed was that document there.
A. That's correct.
Q. And no conversations occurred with anyone from Menominee
County before it was issued?
A. Not by myself.
Q. I'm going to ask you the same question that I asked Mr. Kane. Are you aware of any administrative or statutory
authority which alleviates the licensing agency's obligation
under HSS 56?
A. I'm not sure I understand the question. Under HSS 56 all of
the elements need to be completed. There has to be an application, there has to be a written authorization to do a

criminal background check, there has to be a safety check, an insurance check. All of those things are required. There is no exception to that rule that I'm aware of.

Q. The purpose for which you get that information is set forth in 56.04(1)(a), and that is to enable the licensing agency to verify wherever you need to determine whether the licensing requirements have been established, correct?

A. That's correct.

Q. And you concede in this case that that was not done by the licensing agency?

MR. BOHL: Object to the form of the question.

THE COURT: Overruled. You may answer.

THE WITNESS: Can you repeat?

BY MR. GERBERS:

Q. Sure. You did not go through and verify whether or not those particular elements had been met.

A. Did I personally, no.

Q. As part of these proceedings you signed a response to some interrogatories. Is that correct?

A. That's correct.

Q. Mr. Stuber, showing you what's been marked as Exhibit Number 4, do you recognize that document?

A. Yes, I do.

Q. Is this your signature which appears at the end of that document?

A. Yes, it is.

23 Q. Your signature was under oath, correct?
24 A. Yes, correct.
25 Q. Take a look at Exhibit Number -- or excuse me, Interrogatory

1 Number 2, you were asked to please state in detail the
2 guidelines and policies followed by the county when conducting a
3 background investigation prior to the issuance of a foster care
4 license to any person.
5 Your response was:
6 Shawano County Department of Social Services completes
7 a foster home study in accordance with Chapter 48 of the
8 Wisconsin Statutes and HSS 56 for foster care licensing. For
9 foster care licenses requests by other counties, Shawano County
10 Department of Social Services relies upon the completion of the
11 licensing requirements by the requesting county department and a
12 copy of their foster home study.
13 A. That's correct.

...

1 Correct?
2 A. That's correct.
3 Q. That's the courtesy license that we've referred to here
4 today?
5 A. That's correct, yes.
6 Q. Now, there is no reference in HSS 56 regarding courtesy
7 licenses?
8 A. The word "courtesy" does not appear that I'm aware of, no.

Q. Now, at the time that you answered these interrogatories, number 7, you were asked:

At any time prior to the issuance of a foster care license to Mark Fry, was a criminal background inquiry made with the Department of Justice as required by the Wisconsin Administrative Code?

If the answer is in the affirmative, please state the date upon which the Department of Justice was contacted.

If the answer is negative, please state the reason why this requirement was not performed by the county.

Your response says: Unknown to Shawano County Department of Social Services.

Correct?

A. At the time of this it was unknown, other than my assumption based upon their report that one was done which requires that there be written authorization on the part of the applicant to actually complete whatever investigations, criminal background

they would need to do.

Q. Your whole basis of issuing this license was based upon assumptions that someone else taking care of those requirements, true?

A. And belief that they would follow through as they had in previous cases.

Q. But you never checked into that, did you? You never checked into that before you issued the license.

A. I think, again, based upon your previous question --

Q. Did you or did you not, Mr. Stuber, check to see if the items that are required by the statute --

A. No, I did not.

Q. -- were done? Okay.

Number 8 asked you whether or not to the extent that an inquiry was made to the Department of Justice, what the results of the criminal background investigation were and what the county did further to investigate the information set forth by the Department of Justice.

Once again, unknown to Shawano County Department of Social Services. Correct?

A. At the time of this interrogatory, that's correct.

THE COURT: Can you establish the date of the inquiry?

MR. GERBERS: I don't have that in this particular document, Your Honor. I have the date of the interrogatory as being signed on September 24th, 2001.

...

Q. Did you do anything to try to ascertain whether or not the licensee was still free of any type of crime after the license was issued?

A. Did I personally, no.

...

THE WITNESS: Randall S. Giese, G I E S E.

DIRECT EXAMINATION

BY MR. GERBERS:

17 Q. Good afternoon, Mr. Giese.
18 A. Good afternoon.
19 Q. Detective, would you please state your business address?
20 A. 405 North Main Street, Shawano, Wisconsin, 54166.
21 Q. And your occupation?
22 A. Deputy sheriff for the Shawano County Sheriff's Department.
23 Q. And how long have you held that position?
24 A. I've been a deputy sheriff for approximately 25 years.

...

5 Q. I'm sorry, I should rephrase that question. The first
6 matter that you got involved with that concerned Mark Fry would
7 have occurred on or about October 21st, 1995?
8 A. Yes, that is correct.
9 Q. Detective, can you tell us what you were called to do?
10 A. I was called in for a report of an alleged sexual assault
11 that was at the Shawano County Community Hospital.
12 Q. And who called you?
13 A. I am not sure who called, probably our dispatch center.
14 Q. And what was the information that was relayed to you
15 concerning the facts of your matter?
16 A. There was a juvenile male at the Shawano Community Hospital
17 who they felt had been sexually assaulted.
18 Q. Can you tell us the circumstances under which he was
19 believed to have been sexually assaulted?
20 A. I guess I don't understand where you're going with that,
21 Counselor.

Q. Did you speak to someone, either the minor himself or another party, concerning the specific facts of the alleged sexual assault?
A. Yes.

Q. Can you recall what those were?
A. I first initially spoke with the doctor, and he stated that the young man said to him that he felt like he had been messed with; that his genitals had been touched and the like.
Q. You were specifically told that he went to bed and woke up with some different clothes on?
A. Yes, once I got to talk to him.
Q. All right, let's move right to what he told you.
A. He stated he was picked up by a male at his residence and they had gone to another city and bought some clothing, and had come home. He drank some type of juice, felt tired, groggy, and went up to bed, and felt that he had dreamt that this individual was, as he put it, messing with him.
Q. Did he go into any more detail about what "messing" meant?
A. He felt that Fry had -- or the individual Mark Fry had rubbed his penis on his leg and touched his genitals.
Q. Was there also wetness noticed in the groin area of the young boy's underwear?
A. He said he noticed that it was wet, yes.
Q. What did you do after that?

A. I had the medical staff do a sexual assault kit and spoke with the individual and allowed him to go home with his father who was at the emergency room.
Q. Did you do anything else at this point in time?
A. I don't believe that night any longer.

...

Q. Could you tell the jury what a benzoate is?
A. It's a depressant type substance, but it was only a preliminary test. It couldn't be isolated any further than that.
Q. But wasn't there some subsequent tests that were performed?
A. On the blood? Not to my knowledge on the blood.
Q. That has the effect of being like a tranquilizer, that particular drug; isn't that correct?
A. That is correct.
Q. Did the minor child voluntarily consume any of that to the best of your knowledge?
A. He had stated he was taking a cold medication.
Q. Would that be sufficient to give us what we saw in this particular case?
A. I am not a pharmacist -- I'm not sure.
Q. Okay. You told this to an intake worker at Shawano County Department of Social Services; is that true?
A. Yes.
Q. Why did you do that?
A. It's the policy of our department to notify social services when the victim is a juvenile.
Q. What information -- or, excuse me, what did Shawano County do with that information if anything?

A. I at that point in time told them that the child was safe,
he was going home, and that we would revisit this later as I

could gain more information.
Q. Did Shawano County tell you that, jeez, we have a license
issued to this guy, we have another child in his care?
A. I don't recall them saying that, no.
Q. In fact, you believe you had other conversations with Shawano County personnel after that concerning the October 21st,
1995 incident, true?
A. Pardon? Can you rephrase that, please, sir?
Q. Sure. You believed that you had conversations with Shawano
County Department of Social Services personnel after that time
as well.
A. Yes.
Q. It's my understanding that you took it upon yourself to do
some investigating into this guy's background after this incident.
A. Yes, I did.
Q. My understanding is that you did a computerized check in
Illinois?
A. Yes.
Q. That's something you do from your computer at your office?
A. Yes.
Q. I understand or -- Strike that.
Why did you do it in Illinois?
A. Because I developed information that Mr. Fry had resided in

Illinois.

Q. As part of your check you did a criminal background check,
correct?
A. That would be the teletype I ran, yes, to see if there was a
criminal record.
Q. What did you discover?
A. I found that in running him to Illinois there was a
conviction for disorderly conduct in Cook County.
Q. Is that a misdemeanor?
A. Yes.
Q. Did you then proceed to find out the circumstances of that
arrest?
A. Yes.
Q. What was that? What did you do?
A. I contacted the Northbrook Police Department and asked them
to send the file reference this case.
Q. Were they cooperative?
A. Yes, they were.
Q. They sent you the information you requested?
A. Yes.
Q. Any difficulties getting it?
A. No.
Q. Showing you what has been marked as Exhibit Number 8. Is
that the documentation that you had received from the Northbrook
Police Department?
A. I don't know if this is the entirety of it, but it looks to

be from Northbrook Police Department, yes.
Q. What did you find out about the nature of his misdemeanor

conviction in Northbrook, Illinois?
A. I found that he was convicted reference an incident when he
was on a student's roof at night.
Q. That specifically involved being called to the home, is that
correct, police work?
A. Yes.
Q. Do you remember who had called them?
A. The owners of the house.
Q. And what was he doing? You said he was on the roof. Can
you be a little more specific? What did the police report
indicate; do you recall?
A. That there was a prowler on the roof of this house.
Q. And what did they do, do you recall, the homeowners?
A. Called the police.
Q. And the police responded?
A. Yes.
Q. Now, when they found Mr. Fry -- well, they found the
suspect, they found him on the roof, was he carrying anything?
A. I am not sure they found him on the roof. They found him in
the area, and I think he had a pair of binoculars.
Q. May you be confusing two incidences? Were there a couple
different things asserted in the police file regarding Mr. Fry?
A. A couple different things. I guess I'm --

Q. Let's take a look at the actual incident report if we can.
I believe it's the third page of Exhibit Number 8.
A. Is that the one you're talking --

MR. BOHL: No objection to the admission, Your Honor.
THE COURT: No objection? All right, you may read it,
Counsel.
(Exhibit 8 offered and received.)
THE WITNESS: Are you talking about "reporting officer
responded with units 37 and 34?"
BY MR. GERBERS:
Q. Yes.
A. Okay.
(Reading) Reporting officer reported with units 37
and 34 to 2111 Mallard for a subject on the roof of the house.
Upon arrival at 2111 Mallard, this officer and Officer Matheny,
unit 37, went to the south side of the house. Officer Matheny
then entered the -- rear, I believe -- on the east side of the
house and upon shining his flashlight located the subject
wearing a dark ski mask, black clothes, laying on the roof. At
this time I was also able to locate the subject with my
flashlight. Subject was then ordered to come down from the
roof, and after doing so he was taken into custody and
transported to ESB by Officer Matheny and Patrolman -- I can't
read the name.
Q. Okay. Is it your recollection that he was carrying some

mace and a flashlight?
A. Yes. I believe the mace was in a pocket and the binoculars

3 I spoke of earlier were found on a fence in the location -- near
4 the location.
5 Q. Reaching down towards the window, that's how the parties
6 that had observed him called the police; is that correct?
7 A. I believe so, yes.
8 Q. Reaching down over the roof towards the window and
9 THE COURT: Counsel, what relevance does that have?
10 MR. GERBERS: What's that?
11 THE COURT: What relevance does that have?
12 MR. GERBERS: To the circumstances of the crime.
13 THE COURT: Well, you've established that he was there
14 at the crime.
15 MR. GERBERS: Oh.
16 BY MR. GERBERS:
17 Q. Was that the home of a student at the time?
18 A. Yes, a student in Northbrook, Illinois.
19 Q. Attached to that is a number of pictures; is that correct?
20 Police report?
21 A. Yes.

...

6 Counsel, you may proceed.
7 MR. GERBERS: Thank you, Your Honor.
8 BY MR. GERBERS:
9 Q. We began to talk about some photographs that were taken with
10 respect to Mr. Fry's ninja outfit when he was on top of the home
11 of another student, correct?
12 A. Yes.
13 Q. You've seen those pictures, they're part of your file; is

that correct?
A. Yes, I have.
Q. Are these pictures that were taken by the Northbrook Police
Department of Mr. Fry in his black ninja costume?
A. Looks to be black and white blowups of those pictures, yes.
THE COURT: Do you want to identify that, Counsel, for
the record? It will be part of Exhibit 8?
MR. GERBERS: 8A.
THE COURT: Uh-huh.
BY MR. GERBERS:
Q. Those photos are contained in Exhibit 8 as well, correct?
A. I believe so, yes. Yes.

Q. Now, additionally we discovered another incident that occurred in 1991 on page 14 of this report; is that correct?
MR. BOHL: Object to the form of that question. The
word "initially."
THE COURT: I think he said additionally.
MR. BOHL: Oh, then I misheard.
THE WITNESS: Page 14 you said?
BY MR. GERBERS:
Q. It's identified as page 14. Last two pages of Exhibit Number 8?
A. Okay. Yes.
Q. There's an interview by the police department of another
individual who had contact with Mark Fry. Is that correct?
A. Yes.
Q. Call him Dennis for purposes of these proceedings. Mr. Fry
was Dennis' social studies teacher; is that correct?

17 A. That's what it says, correct.
18 Q. And Dennis actually resided in the Fry home for a short
19 period of time; is that correct, maybe a couple of months?
20 A. That is correct.
21 Q. Moved back in with his family after that; is that correct?
22 A. That is correct.
23 Q. It says here in the report that there were approximately 10
24 to 15 incidents where a subject dressed in dark clothes was
25 observed in his backyard late at night. Correct?

1 A. Correct.
2 Q. Dennis related on several occasions he identified the
3 subject as "offender Fry," usually after a foot chase. True?
4 A. Yes.
5 Q. He would confront Fry who would deny he was in the yard. He 6. remembers two incidents with the offender Fry specifically. The
7 first incident was during the fall of 1989. He was upstairs
8 watching television with friends. Steve Krueger was in Dennis'
9 home sleeping when he was awakened by a subject entering the
10 window. The subject in the window was immediately identified as
11 offender Fry. A foot chase ensued but Fry got away. Correct?
12 A. Yes.
13 Q. His car however was observed in the area? Is that correct?
14 A. Yes.
15 Q. Another time you chased Fry to a point where he was actually

16 stopped by the police, at which point Fry said he was stopped as
17 a result of racing with a friend? Is that correct?
18 A. Yes.
19 Q. And Dennis also advised that when offender Fry was in his
20 yard he always wore black or dark clothes, always wore the same
21 type of gym shoes, and always appeared approximately one hour
22 after his lights were turned out. Correct?
23 A. Correct.
24 MR. GERBERS: Your Honor, I would move Exhibit 8 into
25 evidence.

1 MR. BOHL: I believe it already is, Your Honor, but no
2 objection.
3 THE COURT: All right, Exhibit 8 is received.
4 (Exhibit 8 offered and received.)

...

17 BY MR. GERBERS:
18 Q. Thank you. Finally, in Exhibit Number 8, Detective, there's
19 a statement from a concerned citizen calling Mr. Fry's actions
20 suspect and more deviant in nature; is that correct?
21 A. Yes.
22 Q. This is all information that was available prior to August
23 21st of 1995. Correct?
24 A. I'm sure it would have been, but I didn't get it at that
25 time.

...

1 BY MR. GERBERS:
2 Q. He was in fact convicted. Is that true?

A. He was convicted of disorderly conduct, yes.
Q. You also received a number of newspaper articles; is that
correct?
A. Yes.
Q. Related to the specific allegations of the complaint that he
was on the student's roof in a ninja outfit; is that true?
A. Yes, I received newspaper articles of that incident and
others.
Q. And those articles appear not only in the local Northbrook
Star, but also the Chicago Tribune. Correct?
A. Yes.
Q. Appears to be about 12 different articles; does that sound
about right?
A. I haven't counted them in quite awhile, but that -- yes,
that looks to be approximately.

...

Q. Let's talk about Mr. Waubanascum a little bit. Remember
when your first contact was with Nahquaseh?
A. I believe it was right after he was removed from the home.

...

A. He felt at first that he was dreaming these, much as the
earlier young man Mr. Shawanokasic felt.
Q. Before we move on, did you ever talk to Mr. Waubanascum
about Frank Shawanokasic -- excuse me, about the other
gentleman?
A. No, I didn't.
Q. So his complaints were consistent with that of the one
gentleman who believed he had been assaulted?

A. Yes.
Q. Did he talk about any type of oral sex?
A. Yes, there was mention of that, both asking Waubanascum to perform that and asking to perform it on Fry.
Q. Did he also think that maybe Mr. Fry had inserted his fingers into his rectum?
A. Yes, I believe there was indications of that also.
Q. Did he talk to you about any of his trips?
A. Yes, they talked of one to Phoenix, Arizona, I believe, in which Mr. Fry tried to have sexual relations with him, and also another one in Oshkosh, I believe.
Q. Anything else that he told you about?
A. I'm not aware of any right offhand. I'm sure there were more.
Q. Did he tell you about the episode that he knew was legit as far as going to Albuquerque, New Mexico?

A. Yes.
Q. What did he tell you about that time?
A. I believe that was when Fry put in a pornographic movie and attempted to have sexual relations with him and --
Q. Did he tell his grandmother about what was going on?
A. Yes, he did.
Q. Did he talk to you about how Fry tried to intimidate him as far as telling him he'd have to go back to the group home if he told anybody what was going on?
A. And that everybody would find out. And then he was told to

tell his grandmother that he had lied to her and that that really didn't happen.
Q. You also had some discussions that are contained in your
rt with Doug Snow of the Menominee Tribal Police; is that
correct?
A. Yes.
Q. Based upon your discussions with Mr. Waubanascum as well as
the other young man who had been assaulted, did you have some
suspicion or did you come to some conclusion as to what was
happening as to these dreams?
A. I guess I don't --
Q. What was causing these dreams, what was putting them into
this dreamy state?
A. The information that Investigator Snow supplied was he had
seen a news article on the drug Rohipnol which was a date rape

...

Q. Mr. Fry was ultimately convicted of the crimes that he had
perpetrated against Mr. Waubanascum and the other child; is that
correct?
A. Yes.
Q. And he's still serving prison?
A. As far as I know, yes.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

NAHQUASEH B. WAUBANASCUM,
Plaintiff,
vs. Case No. 01-C-111
SHAWANO COUNTY, JURY TRIAL
Defendant.

VOLUME 2
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE THOMAS J. CURRAN,
UNITED STATES DISTRICT JUDGE, AND A JURY

Milwaukee, Wisconsin
May 11, 2004
9:00 a.m.

Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

...

THE WITNESS: Aida Vinent-Cantoral, A I D A, V I N E N T dash C A N T O R A L.

DIRECT EXAMINATION

BY MR. GERBERS:

Q. Ms. Cantoral, what is your present business address?

A. P.O. Box 462, Greendale, Wisconsin.

...

Q. Now, if in fact Shawano County, as we've heard from Detective Giese in this case, became put on notice -- their social services department was put on notice of these allegations while Mr. Waubanascum was in the Fry home, what would you expect the licensing agency to do in that case?

MR. BOHL: Object to the form of that question. It's a hypothetical question and the witness hasn't been given enough facts to meaning fully address the hypothetical.

THE COURT: Overruled. You may answer.

THE WITNESS: I would have found out more about the allegations and taken steps to put a child in a safe place until the investigation is completed.

BY MR. GERBERS:

Q. And as far as the licensing agency itself?

A. The same thing, sir. I would have done an investigation and made sure that that child was in a safe place in compliance with Chapter 48 and HS 56.

Q. You stated earlier that you were critical of other parties. Why are you so critical of Shawano in this case?

A. They had the ultimate opportunity not to put Mr. Waubanascum

25 in the home of Mark Fry.

...

12 THE WITNESS: Nahquaseh Waubanascum,
13 N A H Q U A S E H, Waubanascum. W A U B A N A S C U M.
14 THE REPORTER: Would you spell your first name again.
15 Please.
16 THE WITNESS: N A H Q U A S E H.
17 DIRECT EXAMINATION
18 BY MR. GERBERS:
19 Q. Nahquaseh, how old are you?
20 A. 24.
21 Q. And your date of birth?
22 A. 8/6 of '79.
23 Q. What nationality are you?
24 A. Native American.

...

10 Q. Now, in December things started to happen in your
11 relationship with Mr. Fry; is that correct?
12 A. Yes.
13 Q. I know that it's not an easy thing for you to go through, I
14 know that there's already testimony from Officer Giese including
15 your statement, but I do want the jury to hear from you as to
16 some of the things that started to happen to you and these
17 dreams that you were having.
18 Would you start by telling us about when they started?
19 A. Usually I was sleeping, I had dreams of him touching me,
20 fondling me, masturbating in front of me, trying to stick
21 himself in me, trying to make me give him oral sex.
22 Q. Did he try to give you oral sex?

A. Yes.
Q. Were you usually erect or no?
A. No.

...

A. What's this.
Q. What was his response?
A. He said some lubricant or something like that.
Q. By this time did you suspect that he was engaging in this activity with you?
A. Kinda, yeah.
Q. I believe that the last episode, at least I'm aware of, was shortly thereafter; is that correct?
A. Yes.
Q. And where did that occur?
A. Albuquerque, New Mexico.
Q. What were you doing down there?
A. Convention, all Indian thing that they went to for schools in the United States.
Q. And when this -- when you went on this trip I understand that there was a pornographic video that was rented?
A. Yes.
Q. And what did Mr. Fry do?
A. He said I know how you like to watch porn movies so here I bought one. And it was --
Q. Did you get into watching porn movies?
A. Well, it was uncomfortable for him to, you know, order that kind of movie.
Q. Okay. What did he do after the movie?
A. Well, he tried to have sex with me.

Q. What did he do? Pull down your pants?

2 A. Yes.
3 Q. And was he naked when he crawled into bed with you?
4 A. Yes.
5 Q. When you say try having sex with you, he tried inserting his
6 penis into your anus, your rectum?
7 A. Yes.
8 Q. What did you do?
9 A. Jumped from the bed.
10 Q. What else did you do?
11 A. I went in the bathroom.
12 Q. Did he ask you to come out of the bathroom?
13 A. Yes.
14 Q. How long did you stay in the bathroom?
15 A. About a half hour.
16 Q. After that half hour expired did you walk out of the
17 bathroom?
18 A. Yes.
19 Q. What was Mr. Fry doing?
20 A. Had his legs in the air.
21 Q. Did he ask you to do anything?
22 A. Asked me to have sex with him.
23 Q. Did he say something specific?
24 A. Maybe it would be more easier if you went.
25 Q. Maybe easier if you did something to him?

...

1 (Recess taken at 4:01 p.m. until 4:16 p.m.)
2 THE COURT: The court has taken some time to examine
3 its notes to see whether or not the facts construed in the light
4 most favorable at this point to the plaintiff establish an
5 actionable claim under 1983.
6 To succeed the plaintiff must show that the defendant
7 deprived the plaintiff of a right that is secured by the

Constitution and the laws of the United States, and, secondly, that the defendant acted under color of state law.

The second requirement is not an issue in this case. The issue that, of course, must be addressed is the first requirement which the plaintiff asserts that the policy maker of the defendant violated his due process rights under the Fourteenth Amendment.

The cases generally provide that they do not -- the defendant does not have a constitutional duty to protect private citizens from harm, except that the courts have recognized that children that are placed in the custody of a state or municipality have a constitutional right not to be placed in a foster home where the state knows or suspects that the children may be subject to sexual abuse.

In other words, to prevail on the plaintiff's 1983 claim, they must prove that the injuries that are alleged to have been incurred by the plaintiff were the result of actions or failure to act by the defendant who knew or had reason to

...

suspect that there was some apt danger lurking there in that home.

Now we get into the definition of "deliberate indifference," and of course there have been many cases that have reviewed that and applied it to a variety of facts. But basically I think it's safe to say that deliberate indifference is found where an actor responds unreasonably to a substantial

and known risk rather than to a risk of which the actor merely should have known.

The time frames indicate here that a license was issued by the defendant on August 21st of 1995. The plaintiff was placed in the Fry home on September 6th of 1995.

According to Exhibit Number 6 and the testimony of Detective Giese, he uncovered evidence of abuse by Fry on October 21 of 1995, and based upon his testimony on that date, or the date following, he notified the Department of Intake Social Services at the defendant county that this incident had come to light. It wasn't then until February 28 in 1996 that the plaintiff was removed from the Fry residence.

Under these circumstances the court feels that it is an issue for the jury to determine whether or not the actor in this case, the county, responded unreasonably to a substantial and known risk in that home and, therefore, the court is going to deny the motion.

F-36

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

NAHQUASEH B. WAUBANASCUM,
Plaintiff,
-vs-
SHAWANO COUNTY,
Defendant.

Civil Action No. 01-C-111
Milwaukee, Wisconsin
May, 12, 2004

VOLUME 3 – Page 424
TRANSCRIPT OF TRIAL – BEFORE THE
HON. THOMAS J. CURRAN
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES

For the Plaintiff:
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For the Defendant:
Whyte, Hirschboeck, Dudek, S.C.
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Court Reporter:
Heidi J. Trapp
310, U.S. Courthouse
517 E. Wisconsin Avenue
Milwaukee, WI 54302
(414) 297-3071

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

...

THE WITNESS: My name is Nancy Odierno. name is spelled O-D-I-E-R-N-O.

DIRECT EXAMINATION

BY MR. BOHL:

Q. Good morning, Miss Odierno. How are you?

A. Good. How are you doing?

Q. Fine. Thank you. Can you tell the ladies of the jury what community you live in?

A. What community I live in right now?

Q. Where do you live?

A. Shawano, Wisconsin.

Q. Are you familiar with Menominee County?

Yes, sir.

...

Q. And did Mr. Fry give you three references?

A. Yes, sir, he did.

And just so we're clear, why don't you tell us what you mean when you say reference?

A. Somebody that can speak on behalf of the person to say whether they'd be appropriate or not. Somebody that knows them. Somebody that may have grown up with them, but somebody that's not a relative.

Q. Did Mr. Fry provide you with three references?

A. Yes, sir, he did.

Q. Did you do anything with regard to those references?

A. Yes, sir. I called two of them and have phone conversations with them, which I documented. I didn't speak with the last one.

Q. Can you give us the names of the three and tell us which

ones you talked to, and which one you didn't talk to?
A. There was a man. I believe David Robinson. A lady named
Shelly Hutter. Those are the two people I spoke with over the
phone that were both I think in the Chicago area.

...

CROSS EXAMINATION
BY MR. GERBERS:
Q. Miss Odierno, when you met with Mr. Fry you didn't talk to
him about his past employment with respect to why he left his
position, is that true?
A. I am sorry. Can you say that again?
Sure.
THE COURT: Just a minute, counsel. Hold the

...

question while she pours herself--
THE WITNESS: That's okay. I didn't want to
spill it.
MR. GERBERS:
Q. You had--specifically, you can't recall whether or not you
contacted any present or past employers prior to completing
your home study, is that correct?
A. I can't remember if I contacted them, or if I--I know I
spoke
past employment.

...

Testimony By Ronald Stuber

Q. I am going to ask you a few specific questions about this
incident. You were involved with the issuance of the foster

care license to Mark Fry, is that correct?
A. Yes.
Q. If you could just state generally, how did Shawano County
get involved?
A. Basically at the time that someone is seeking to place a
child, after a period of time they have to be licensed as a
foster parent.

...

Q. If Shawano County had become aware the abuse that took
place, would Shawano County have had the authority to remove
Waubanascum from the home?
MR. GERBERS: Objection. Foundation.
THE COURT: Overruled. He may answer.
THE WITNESS: Yes. We would have done all we
could to insure the safety of the child.

...

CROSS EXAMINATION
BY MR. GERBERS:
Q. Mr. Stuber, you were present during the course of this
entire trial, true?
A. That's correct.
Q. And you heard Miss Odierno testify that she gathered the
information to prepare her home study and also proceeded to get
a background check performed by the State of Wisconsin, and
that information was delivered to Shawano County to determine
whether or not that information should result in the issuance

of a license, or if you need to do anything further. Did you

hear that testimony?
MS. KOPP: Object to the form of the question, Your Honor.
THE COURT: Overruled. He may answer.
THE WITNESS: That isn't what I heard her testify to.
MR. GERBERS:
Q. All right. She had indicated that--specifically that the background check as specified on the home study report identified in this case as Exhibit Number 1 would be placed within the file upon receipt, is that true?
A. That's correct.
Q. She also testified that it wasn't even received by Menominee County until October 16th of 1995, correct?
A. That's correct.
Q. And in fact you had issued your license well before October 16th, 1995?
A. I testified to that, that's correct.
Q. And the truth of the matter is you didn't even know the results of this test, even though she testified it was forwarded to your Department in 2001?
MS. KOPP: Objection, Your Honor. Argumentative.
THE COURT: Overruled.
THE WITNESS: No, I did not personally know.

MR. GERBERS:
Q. So the results of this background check could have been in Illinois, they could have been in Wisconsin, could have been

anywhere. You wouldn't have known them because it was your policy to rely upon Menominee County to fulfill the licensing requirements, true?

A. We relied upon Menominee County to fulfill all of the requirements of HSS-56, that's correct.

Q. And you testified for us on Monday that ultimately you could reject that application. That was your decision to make.

A. Based upon the information available to me, that is exactly what happens.

Q. Now, you testified that there is a need for foster parents.

That's--would you agree that that does not alleviate the need to make sure that the foster homes are suitable place for children?

A. Of course not. That is why you want to do an extensive study, to insure that safety of children.

Q. That would be with or without the Statute, isn't that correct?

A. Exactly. That's what I have done for 30 years.

Q. And Chapter 48, as testified to by Miss Cantoral in this case, specifically recognizes a child's right to be placed in a home that is free from physical, sexual, or emotional injury or exploitation, is that correct?

A. That's correct.

...

Q. Mr. Stuber, you understand that HS-56 specifically indicates that the whole purpose of this is to verify

whether or not they are entitled or they're qualified to receive a license, isn't that true?

A. That's correct.

...

Q. That's the requirements to receive a license for a foster home?

A. And that's what we accept this foster home study to be, is a documentation that those requirements have been met, and in fact were met.

Q. So it's your testimony--you're telling the jury here today that this requires you to obtain that authorization. It does not require you to obtain a background check before you issue the license?

MS. KOPP: Objection, Your Honor. Misstates his prior testimony.

THE COURT: Overruled. He may answer.

THE WITNESS: What I am trying to say is the requirement--if you read that HSS-56, indicates written authorization for the license means you contact the Department of Justice or any Federal or local law enforcement agency to determine whether the applicant is unqualified to receive the license for any reason. That's exactly what it says.

Q. So you don't make that determination as to whether or not they're unqualified to receive a license before you issue it. That's what you're telling the jurors?

A. No, what I am telling--what I am trying to say is that they--once they have met that requirement, we will seek and do all of the background checks that we can possibly do to insure the safety of the child. Which was complied with and was received back.

Q. Mr. Stuber, I--I don't want to argue with you, but I just read to the jury that the purpose of this was to determine whether the applicant is unqualified to receive a new license. That's what you just read, isn't that?

A. Certainly.

Q. Okay.

THE COURT: What he is asking you, sir, is did you issue the license before you received the information that

...

is required from the waiver?

THE WITNESS: We did not receive the information from the waiver. Menominee County, who did the investigation, is my understanding.

THE COURT: Well, according to the testimony previously, this was not received until October. By Menominee County.

THE WITNESS: Are we speaking of the written authorization? Or the response? The response was not received back yet at that time.

THE COURT: And his question to you is, sir, do you understand that your duty expires simply by obtaining the

waiver before the results of the investigation are completed?

THE WITNESS: I believe that would be my understanding. That we need to--we are required to receive the written authorization to follow through on.

THE COURT: Sir, I am not getting through to you, either. What we're asking you is in this case the license was issued before any response was received from the Wisconsin Department of Justice. You understand that?

THE WITNESS: Yes, I do.

THE COURT: And what the counsel is asking you--perhaps I am not helping you by making it anymore clear--is do you normally issue a license before you receive any response from the Wisconsin Department of Justice?

...

THE WITNESS: We would issue the license as long as we have received the written authorization to pursue--

THE COURT: Regardless of what that report might show?

THE WITNESS: No.

THE COURT: Is that what you're saying?

THE WITNESS: No. If we got back a report that would indicate there are many things done prior--

THE COURT: But, sir, listen to me now. And I know you have trying to get this point across, and I think you have to the jury. But the thing that counsel has been asking you--and I don't want to take anymore time than is necessary--but is it your practice to issue the license before you get the report back from the Justice Department as to the

background of this individual?
THE WITNESS: I guess I'd have to say yes. We have issued licenses awaiting the result of the background check.
THE COURT: Before you ever get that report back?
THE WITNESS: Before we get that report back.
THE COURT: Before you know whether this individual has been convicted of felonies and whether they are--
THE WITNESS: That I was aware of, all of the

...

information was there. I don't know. I would have to--
THE COURT: Just answer my question, now.
THE WITNESS: I would want to comply with the law as best I could. And that's--I guess I would--yes.
THE COURT: Sir, that's not an answer to my question.
THE WITNESS: Yes, I would issue.
THE COURT: You would issue them before you got the report back?
THE WITNESS: Yes, I would.
THE COURT: All right.
MR. GERBERS: I have nothing further, Your Honor.

Redirect by Ms. Kopp:

Q. Mr. Stuber, if I can clarify this issue. It's your testimony that under HSS-56 it requires that you get an authorization from the foster care applicant, correct?
A. That's correct.
Is it your understanding that that is where your obligation ends? Or do you believe that the agency has to do more?
We have to do more. We have to do all that we can.

No. 05-551

OFFICE OF THE CLERK

In The

Supreme Court of the United States

NAHQUASEH B. WAUBANASCUM,

Petitioner,

v.

SHAWANO COUNTY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Seventh Circuit Court of Appeals correctly applied the standards of Fed. R. Civ. P. 50 in reversing a jury verdict in favor of Petitioner and in granting judgment as a matter of law to Respondent.

2. Whether the Seventh Circuit properly concluded on the facts of record that Petitioner could not establish that Respondent violated his Fourteenth Amendment substantive due process rights.

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STATEMENT OF THE CASE

I. THE NATURE OF THE CASE AND THE PROCEEDINGS BELOW.

Petitioner, Nahquaseh B. Waubanascum ("Waubanascum"), commenced this action seeking a remedy under the Due Process Clause for sexual abuse that he suffered at the hands of his foster father. Waubanascum sued Menominee County, Wisconsin, which placed him in the foster home and monitored the placement, and the Menominee Indian School District, which employed the foster parent as the local high school principal. Waubanascum also sued respondent, Shawano County, Wisconsin ("Shawano County" or the "County"), which issued the foster care license to the foster parent, but which never had Waubanascum in its custody and did not place him in the foster home.

Waubanascum settled his claims against Menominee County and the Menominee Indian School District before trial. (Record ("R.") 72; App. at A-7.) Waubanascum's claims against Shawano County were tried to a jury beginning on May 10, 2004. On May 13, 2004, the jury returned a special verdict in favor of Waubanascum and against the County awarding $175,000 in damages to Waubanascum. (R. 95.) The District Court then entered a judgment in favor of Waubanascum and against the County. (R. 97.)

On May 25, 2004, the County filed a motion for judgment as a matter of law, or, in the alternative, for a new trial. (R. 98.) By Decision and Order entered on August 24, 2004, the District Court denied the County's motion. (R. 117; App. at C.) That same day, the District Court entered an amended judgment in favor of Waubanascum and

against the County in the amount of $175,000, together with attorney's fees in the amount of $69,259.50, post-judgment interest, and taxable costs. (R. 118; App. at D.)

Following a timely appeal by the County, the Seventh Circuit Court of Appeals issued a Decision on August 1, 2005, reversing the District Court's denial of the County's motion for judgment as a matter of law and vacating the judgment entered by the District Court. (R. 130; App. at A.)

II. STATEMENT OF FACTS.

A. Background.

Waubanascum was raised by his grandparents on the Menominee Indian Reservation in northeastern Wisconsin. (R. 127 at 273-75.) When he was fifteen or sixteen, Waubanascum stole a car and, as a result, was placed in a series of group homes for boys. (*Id.* at 275-76.) In 1995, at age 16, Waubanascum was placed in the legal custody of Menominee County. (*Id.* at 273 & 408.)

In 1995, Mark Fry was the principal of the Menominee Indian Junior/Senior High School, located in Menominee County. (*Id.* at 418.) Fry was licensed by the Wisconsin Department of Public Instruction as a high school teacher and a principal. Fry had previously taught high school history for ten years in Illinois. (Ex. 1; R. 126 at 108.)

Waubanascum first met Fry when he was in junior high school. (R. 127 at 277.) Fry came to visit Waubanascum when he was placed in the group homes. (*Id.* at 277 & 280.) Ultimately, Fry suggested that Waubanascum come live in his home as a foster child. (*Id.* at 281.)

In 1995, Ron Stuber was the Director of the Shawano County Department of Social Services (the "Department"). He had held that position since 1988. (R. 125 at 476-77.) In 1995, Richard Kane was the Deputy Director of the Department. (R. 126 at 104-05.) The Department is supervised by the Shawano County Board of Supervisors. (R. 125 at 477-78.)

B. The Fry Foster Care License.

1. Fry's Application To Menominee County.

In 1995, Fry submitted an application to be a foster parent to Menominee County. (Ex. 1000; R. 127 at 398; R. 125 at 441-42.) After receiving Fry's application, Menominee County gathered background information from Fry and conducted a home study of Fry. (R. 127 at 398-99.) A home study includes a home visit or visits to evaluate the physical condition of the home and determine whether it is safe for children. An oral interview is also conducted with an applicant to evaluate his views on parenting, education, and supervision, among other things. A release for a criminal background check is also obtained from the applicant, and the applicant's references are also checked. (*Id.* at 401.)

Menominee County, as the county seeking to have Fry licensed, performed these tasks in connection with Fry's application. (*Id.* at 402 & 406.) Menominee County believed it was its responsibility to take care of the licensing requirements in connection with Fry's application under applicable state regulations. (R. 125 at 432.) According to a supervisor for Menominee County:

> We were the agency requesting that he be licensed. We were the agency he approached for

> licensing. We were the agency that intended to place a child there. We did the required background check, document gathering. Basically built his file. And then requested that Shawano County sign or issue the license.

(R. 127 at 402.)

Specifically, Menominee County performed a home study of Fry. (Exs. 1 & 1004; R. 127 at 403; R. 125 at 446 & 448; R. 126 at 108.) A representative of Menominee County met with Fry at least three times (at his home, his office at the school, and the Menominee County offices) over the course of eight to ten hours in connection with the home study. (R. 125 at 448 & 450.) The home study described Fry's residence, his family history, and his educational and work background, including ten years of prior educational experience in Illinois. (Ex. 1; R. 126 at 108.)

Fry consented to a criminal background check as part of the application process, and Menominee County requested that the Wisconsin Department of Justice perform the check on Fry (as it does on every other foster care applicant). (Ex. 1001; R. 127 at 417; R. 125 at 443 & 448.) At the time, such a criminal check normally took about six weeks for the Wisconsin Department of Justice to process. (R. 125 at 455.) The criminal background check on Fry came back negative – with "no hits." (Ex. 1002; R. 127 at 417; R. 125 at 456-57.) Menominee County received the State's report of the criminal background check on October 16, 1995. (Ex. 1002; R. 125 at 456 & 469.) The criminal background check performed by the Wisconsin Department of Justice did not search for convictions outside of Wisconsin. (R. 127 at 419.) The administrative regulations issued by the Wisconsin Department of Health & Social Services then in effect did not expressly require a federal

criminal background check of a foster care license applicant. (*Compare* Ex. 2 at HSS 56.03(4)(a)(2) and at HSS 56.04(4m)(a); R. 126 at 108; App. E-4 & E-7.)

Menominee County also checked several of Fry's personal references, and neither of the two individuals that were contacted raised any red flags regarding Fry. (R. 127 at 418; R. 125 at 452 & 454.) Fry was also well known in Menominee County, a sparsely populated community, because of his position as the high school principal. (R. 127 at 418-19.)

Based on the home study conducted by Menominee County, Fry was considered to be a good candidate for licensure. (Ex. 1; R. 126 at 108; R. 125 at 458.) According to the home study:

> Mark Fry appears to be a very intelligent and caring individual. His desire to help seems very genuine. It is this interviewer's opinion that a child in need who may be academically struggling would receive excellent care from Mr. Fry.

(Ex. 1 at 2; R. 126 at 108.) According to the Menominee County social worker who conducted the home study:

> Mr. Fry appeared very intelligent. He appeared eager to assist in different things. He seemed to care about kids. You know hindsight, of course, you know, contradicts that. But at the time he appeared to be a valuable resource for kids who may have had educational issues.

(R. 125 at 449-50.) As its conclusion, the home study stated that Fry met the standards set forth in the applicable Wisconsin regulations governing the licensing of foster homes. (Ex. 1 at 2; R. 126 at 108.)

Ultimately, Menominee County contacted Shawano County to issue the license. (R. 127 at 399.) Menominee County did so because Fry lived just across the border from Menominee County in Shawano County. (*Id.* at 400; R. 126 at 117.) Menominee County informed Shawano County that it was doing a background check of Fry as part of its processing and review of his application. (R. 127 at 403.) Menominee County did not expect that Shawano County, or any other county, would duplicate its background check of Fry. (*Id.* at 405 & 407.)

2. The License Issued By Shawano County.

Shawano County agreed to issue a foster care license to Fry at the request and recommendation of Menominee County. (Ex. 1005; R. 126 at 124.) Shawano County had issued such a license (referred to at trial and on appeal as a "courtesy license") on occasion in the past to Menominee County and two other neighboring counties. (R. 125 at 479.) Shawano County never experienced any problems in issuing courtesy foster care licenses prior to the Fry application. (*Id.* at 482.) Other counties in Wisconsin, including Milwaukee County, the state's most populous county, have issued similar courtesy licenses in the past as well. (R. 127 at 239-40.)

In responding to Menominee County's request in this instance, Shawano County reviewed the foster home study completed by Menominee County, as it represented a summary of all of the work completed by Menominee County on the application at that point. (R. 125 at 480 & 485; R. 126 at 121.) Based on the home study and its past experience with Menominee County, Shawano County believed that a criminal background check had been or

was being done on Fry by Menominee County. (R. 125 at 488; R. 126 at 121-22.) Shawano County did not believe it had any reason to doubt the home study conducted by Menominee County. (R. 125 at 491.)

Shawano County issued the license to Fry on August 21, 1995. (Ex. 1005; R. 126 at 124; R. 125 at 469 & 487.) Under the license, Menominee County was responsible for the placement of any foster children in the home. (Ex. 1005; R. 127 at 399 & 403; R. 125 at 459; R. 126 at 123-24.) Accordingly, Shawano County had no knowledge of whom, if anyone, Menominee County would place in the Fry home at the time it issued the license. (R. 126 at 115 & 118.) Shawano County never placed anyone in the Fry foster home. Further, under the license, Menominee County was responsible for the supervision of the Fry foster home. (R 127 at 399; R. 125 at 459.)

C. Waubanascum's Placement With Fry.

In September 1995, Menominee County placed Waubanascum in the Fry foster home. (R. 127 at 408.) Menominee County continued to have legal custody of Waubanascum even after he was placed in the Fry home. (*Id.* at 409.) Shawano County never had custody of Waubanascum. (R. 125 at 491-92; R. 126 at 119 & 122.) Shawano County was not even advised that Menominee County was placing Waubanascum in the Fry home. (R. 126 at 123.)

In October 1995, a supervisor in the Menominee County Human Services Department learned that a student in the Menominee Indian School District had presented to a local hospital emergency room making allegations of possible sexual contact by Fry. (R. 127 at

412.) Randall Giese, a Deputy Sheriff with the Shawano County Sheriff's Department, was called to the hospital to investigate the allegations. (R. 126 at 151-52 & 159.) Giese informed the Menominee County Department of Social Services of the allegations, which, as is described below, investigated the allegations itself and considered removing Waubanascum from the home. (R. 127 at 412.) Giese also verbally informed an unnamed intake worker at the Shawano County Department of Social Services by telephone of the results of his initial investigation at the hospital, telling the intake worker that the child in question was safe and that he would seek further information. (R. 126 at 162-63.) In the course of his further investigation, Giese learned that Fry had been convicted of disorderly conduct in Illinois under circumstances indicating misconduct on his part with respect to one of his students at the time. (*Id.* at 163-64.)

Neither Ronald Stuber, the Director of Shawano County's Department of Social Services, nor Richard Kane, the Department's Deputy Director, were aware of these allegations against Fry or Deputy Sheriff Giese's investigation before April 1996, when Fry's foster license was revoked. (*Id.* at 112-13 & 141.) There was no evidence introduced at trial suggesting that the allegations regarding Fry were shared with anyone employed by Shawano County other than Deputy Sheriff Giese or the unnamed intake worker at the County's Department of Social Services.

At the time of the October 1995 allegations involving Fry, Waubanascum was in Menominee County's Intensive Supervision Program. Under this program, two licensed social workers from Menominee County had face-to-face contact with Waubanascum seven days a week and with

his foster parent and his school at least once a week. (R. 127 at 413-14; R. 125 at 507-08.) The social workers visited the Fry residence two to three times a week during the entire time Waubanascum was placed in the home. (R. 125 at 508.) There is no higher level of supervision of a foster child by county social workers in Wisconsin. (R. 126 at 126 & 148.)

In the fall of 1995, Menominee County did not perceive any problems with Waubanascum's foster placement based on its daily supervision of him. (R. 127 at 413-15; R. 125 at 508.) According to a Menominee County supervisor, Menominee County believed Waubanascum was doing well in the home in terms of his mental health, his behavior, his school attendance, and his grades. (R. 127 at 413.) Once the allegations against Fry surfaced in October 1995, the two social workers assigned to Waubanascum confronted Waubanascum about the allegations to ask him if he was having any problems. (*Id.* at 414-15.) Waubanascum told the social workers that things were fine and that he wished to remain in the Fry home. (*Id.*; R. 125 at 432 & 510-11.) As a result of the allegations by the other student, Menominee County became even more vigilant in its contacts with and supervision of Waubanascum. (R. 127 at 416.) Menominee County considered removing Waubanascum from Fry's home but it did not do so based on the results of its investigation and its supervision of Waubanascum. (*Id.* at 412-16.)

D. The Removal Of Waubanascum And The Revocation Of The License.

In the spring of 1996, Waubanascum informed one of his Menominee County social workers that Fry had been sexually abusing him. (R. 125 at 511-12 & 493.) Menominee

County removed Waubanascum from the Fry home the same day it learned of the abuse. (R. 127 at 416; R. 125 at 512.)

Shawano County revoked Fry's foster care license on April 30, 1996. (R. 125 at 493.) Shawano County was not aware of any misconduct by Fry, with respect to Waubanascum or otherwise, until the day it revoked his license. (R. 126 at 112-13, 127, & 141-42; R. 125 at 493.) Shawano County had no knowledge of Fry's criminal conduct in Illinois when it issued the license or at any point prior to its revocation of his license. (R. 125 at 492; R. 126 at 127 & 141.)

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT DID NOT MISAPPLY RULE 50 IN REVERSING THE JURY VERDICT AND GRANTING JUDGMENT TO SHAWANO COUNTY.

A. The Rule 50 Standard.

Under Rule 50 of the Federal Rules of Civil Procedure:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Fed. R. Civ. P. 50(a)(1).

As the Seventh Circuit properly noted, "attacking a jury verdict is a hard row to hoe." (App. at A-19 (quoting *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1043 (7th Cir. 1999)).) Yet, as this Court has long recognized, a mere "scintilla or modicum of conflicting evidence" is decidedly not enough to create an issue that can only be left to a jury for resolution. *See, e.g., A.B. Small Co. v. Lamborn & Co.*, 267 U.S. 248, 254 (1925). Indeed, "a trial judge must direct a verdict [under Rule 50(a)] if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943). The same is necessarily true for a federal circuit court of appeals in reviewing a jury verdict on appeal. *See, e.g., Gower v. Vercler*, 377 F.3d 661, 666 (7th Cir. 2004); *McGreevey v. Daktronics, Inc.*, 156 F.3d 837, 840 (8th Cir. 1998).

In its decision in this case, the Seventh Circuit plainly described a standard of review that is wholly consistent with Rule 50. As the Seventh Circuit noted, it was required to view all of the evidence presented at trial in the light most favorable to Waubanascum, as the non-movant. (App. at A-8 (citing *Gower*, 377 F.3d at 666; *DeBiasio v. Ill. Cent. R.R.*, 52 F.3d 678, 682 (7th Cir. 1995)).) Further, the Seventh Circuit observed that it was bound to "examine the record as a whole to determine whether there was sufficient evidence from which a reasonable jury could have returned the verdict," but that it could not "reweigh this evidence nor substitute [its] own credibility determinations for that of the jury." (*Id.* (citing *Marshall ex rel. Gossens v. Teske*, 284 F.3d 765, 770 (7th Cir. 2002); *Gower*, 377 F.3d at 666).) Consistent with this Court's reasoning in *Anderson*, however, the Seventh Circuit also noted that

judgment as a matter of law is nonetheless appropriate "[i]f reasonable persons could not find that the evidence justifies a decision for a party on an essential element of its claim." (*Id.* (citing *Deimer v. Cincinnati Sub-Zero Prods., Inc.*, 58 F.3d 341, 343 (7th Cir. 1995)).)

B. The Seventh Circuit Properly Applied Rule 50 In Granting Judgment To Shawano County.

The Seventh Circuit did not disregard well-established Rule 50 standards or ignore material evidence heard by the jury, and it properly decided to reverse the jury verdict and grant judgment as a matter of law to Shawano County.

1. The Seventh Circuit Properly Concluded That Shawano County Owed Waubanascum No Constitutional Duty, And The Factual Oversights Now Alleged By Waubanascum Do Not Affect This Conclusion.

In *DeShaney v. Winnebago County Department of Social Services*, this Court held that the Due Process Clause does not require the state to protect the life, liberty, and property of its citizens from deprivation by private individuals and does not act as a guarantee of certain minimal levels of safety and security. 489 U.S. 189, 195 (1989). As the *DeShaney* Court noted, "[a]s a general matter, . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197.

As the lower courts have noted, two exceptions exist to this general rule. *See, e.g., Monfils v. Taylor*, 165 F.3d 511, 516 (7th Cir. 1998). "One exists if the state has a 'special relationship' with a person, that is, if the state has custody of a person, thus cutting off alternate avenues of aid." *Id.* However, as the *DeShaney* Court itself observed, such a special relationship does not arise simply from the state's knowledge of an individual's predicament; instead, it arises from limitations the state may have imposed on the individual through a restraint on his personal liberty. *DeShaney*, 489 U.S. at 200. The other exception to the general rule of *DeShaney* is the "state created danger" exception, which exists where the state "affirmatively places a particular individual in a position of danger the individual would not otherwise have faced." *Monfils*, 165 F.3d at 516 (citations and internal quotations omitted); *see also Hutchinson ex rel. Baker v. Spink*, 126 F.3d 895, 900 (7th Cir. 1997); *K.H. through Murphy v. Morgan*, 914 F.2d 846, 849 (7th Cir. 1990).

Here, the Seventh Circuit concluded that Waubanascum did not satisfy either exception to the general rule of *DeShaney* based on all of the evidence of record, finding that Waubanascum did not prove either the existence of a "special relationship" between him and Shawano County or that the County affirmatively placed him in a position of danger that he otherwise would not have faced. (App. at A-10 – A-20.)

As is discussed below in Point II below, the Seventh Circuit did not err in reaching these conclusions. At a minimum, Waubanascum's arguments with respect to the Seventh Circuit's application of Rule 50 to the jury verdict do not undermine the Seventh Circuit's determinations in this regard in the least. Indeed, none of Waubanascum's

arguments regarding the Seventh Circuit's supposed disregard of certain trial evidence relates to the existence or non-existence of a duty owing from Shawano County to Waubanascum under the exceptions to *DeShaney*. Absent such a duty, however, there is no basis to hold Shawano County liable under the Due Process Clause. *DeShaney*, 489 U.S. at 197.

On this point, Waubanascum is incorrect in implying that the Seventh Circuit need not have concerned itself with the issue of whether a duty existed under *DeShaney* and instead simply should have considered the general question of whether Shawano County had a policy or custom that "exhibited deliberate indifference to the rights of its citizens." (Petition at 13.) As *DeShaney* made clear, and as the Seventh Circuit correctly noted, the question of whether a constitutional duty exists under the Fourteenth Amendment is a necessary predicate to any claim under the Due Process Clause in this context. Indeed, even the cases cited by Waubanascum acknowledge, in the context of *Monell* claims against a municipalities, that the duty of substantive due process only arises when the municipality either has a special relationship with the plaintiff or affirmatively places him in a position of known danger. *See, e.g., City of Canton v. Harris*, 489 U.S. 378, 387 (1989) (analyzing a *Monell* failure to train claim against a municipality arising from a failure by police to provide medical care to the plaintiff while she was in police custody); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 723 (3rd Cir. 1989) (noting that *DeShaney* provides that there is "no constitutional duty on the state to provide its citizens with particular protective services" except in limited circumstances where the Constitution imposes "affirmative duties of care and protection" and distinguishing the

claims before it because the plaintiff had suffered abuse at the hands of a government employee rather than a private actor); *Ruge v. City of Bellevue*, 892 F.2d 738, 741-42 (8th Cir. 1989) (acknowledging that the defendant municipality could be liable on a substantive due process claim brought by the mother of a deceased municipal employee if she could show that the city actively placed the decedent into a situation of known danger).

For these reasons, Waubanascum's arguments under Rule 50, standing alone, do not provide a basis for granting the requested writ of certiorari.

2. The Seventh Circuit Also Properly Concluded That Waubanascum Failed To Demonstrate Deliberate Indifference On The Part Of Shawano County.

As the Seventh Circuit noted, Waubanascum had the burden of proving not only that Shawano County owed him a duty under the Due Process Clause but also that, given such a duty, the County exhibited deliberate indifference to his rights. (App. at A-12.) The Seventh Circuit properly concluded that Waubanascum failed to prove such deliberate indifference on the part of the County, and his arguments under Rule 50 do not undermine this conclusion.

The Seventh Circuit applied a "modified" deliberate indifference standard in its analysis, under which it looked to see if a reasonable jury could have concluded that the County had actual knowledge or a suspicion that Waubanascum was likely to suffer abuse or some other serious harm at the hands of his foster parent and then ignored that knowledge or suspicion. (App. at A-12 (citing *J.H.*

ex rel. Higgin v. Johnson, 346 F.3d 788, 792 & 795 (7th Cir. 2003); *K.H.*, 914 F.2d at 852; *Camp v. Gregory*, 67 F.3d 1286, 1293 (7th Cir. 1995)).)[1] Furthermore, because Waubanascum's claims were against Shawano County, he was also subject to the burden of proof imposed generally with respect to § 1983 claims against municipal entities. *See, e.g., Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978) (holding that, to establish municipal liability under § 1983, a plaintiff must demonstrate the existence of a municipal policy or custom that caused the deprivation of his constitutional rights). Under these standards, the Seventh Circuit properly found that Waubanascum had not established § 1983 liability on the part of the County either with respect to its issuance of a foster care license to Fry or its actions following the issuance of the license. (App. at A-12 – A-16.)

a. The Issuance Of The License.

Waubanascum attacks the Seventh Circuit's decision with respect to the issuance of the foster care license to Fry by focusing on the background investigation conducted of Fry before Shawano County issued the license. According to Waubanascum, the jury could reasonably have concluded that the County acted with deliberate

[1] Waubanascum observes that two other circuit courts, the Third and Tenth Circuits, have applied the "professional judgment" standard in evaluating due process claims in the foster care context. (Petition at 12 n.4.) However, Waubanascum does not suggest that this Court should consider the question of whether the modified deliberate indifference standard or the professional judgment standard is more properly applied to the facts of this case. Nor does he explain how the outcome of this case would have been different if the professional judgment standard had been used below.

indifference in issuing the foster care license to Fry in that Shawano County officials were aware of a general risk to foster children in the absence of background checks on prospective foster parents as required by Wisconsin law. In particular, Waubanascum points to the fact that the criminal background check on Fry was not complete at the time Shawano County issued a foster care license to Fry. (Petition at 14.)

As the Seventh Circuit itself noted, however, this argument fundamentally misconstrues the applicable due process standard. Indeed, rather than proving that Shawano County had actual knowledge, or a least a suspicion, that Fry would abuse a foster child placed in his care, Waubanascum rests his argument on the possibility that a greater risk of abuse existed as a result of the County's practice relating to courtesy foster care licenses. However, a finding of deliberate indifference cannot rest on such a mere possibility of risk rather than a subjective awareness of risk that is subsequently ignored. (App. at A-13.) *See also Farmer v. Brennan*, 511 U.S. 825, 837, & 841-42 (1994) (noting that the deliberate indifference standard consists of both an objective and a subjective component and holding, in the jail context, that a public official cannot be held liable unless "the official [is both] aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and . . . also draw[s] the inference").

Further, as the Seventh Circuit also correctly observed, Wisconsin law on criminal background checks for prospective foster parents does not create a duty under the Due Process Clause. Thus, even assuming that Shawano County violated the applicable provisions of the state regulations governing the licensing of foster parents in issuing a license to Fry before a criminal background

check was complete (an argument that is suspect given the plain language of HSS 56 of the Wisconsin Administrative Code as it existed in 1995),[2] it is firmly established that state law violations are not sufficient to establish § 1983 liability. *See, e.g., DeShaney*, 489 U.S. at 202; *see also White v. Olig*, 56 F.3d 817, 820 (7th Cir. 1995); *Burgess v. Ryan*, 996 F.2d 180, 184 (7th Cir. 1993); *Martin v. Tyson*, 845 F.2d 1451, 1455 (7th Cir. 1988).

Finally, Waubanascum's argument on this issue also fails given the facts presented at trial. Even when viewed in the light most favorable to Waubanascum, the evidence unquestionably demonstrated that Shawano County did not possess actual knowledge, or even a suspicion, that Fry presented a risk, either generally or to Waubanascum specifically, before it issued him a foster care license.

Indeed, while Shawano County issued the foster care license to Fry, it did so at the specific request of neighboring Menominee County. (R. 127 at 399.) At the time it issued the license, Shawano County did so on the basis of the home study conducted by Menomine County. (R. 125 at 480 & 485; R. 126 at 121.) This home study was based in large part on an extensive set of interviews by Menominee County personnel with Fry, as well as an inspection of his home, and a check of his references. (R. 125 at 448, 450, 452, & 454.) According to the home study, Fry was a good candidate for the issuance of a foster care license.

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[2] The applicable provisions of § HSS 56 specified only that an applicant for a foster care license was to provide written authorization for the licensing entity to conduct a criminal background check, but they did not outline specifically when or how that check was to be conducted. (Ex. 2 at 4 & 7 (Wis. Admin. Code §§ HSS 56.03(4)(a)(2) & 56.04(4m)(a)); R. 126 at 108; App. at E-4 & E-7.)

(Ex. 1; R. 126 at 108.) In fact, the Menominee County social worker that prepared the study indicated as follows in the "evaluation" portion of the study:

> Mark Fry appears to be a very intelligent and caring individual. His desire to help seems genuine. It is this interviewer's opinion that a child in need who may be academically struggling would receive excellent care from Mr. Fry.

(*Id.*) No problems were indicated in the home care study, and, to the contrary, the study specifically concluded that Fry met the standards set forth under Wisconsin law with respect to foster care licenses. (*Id.*)

Thus, when it issued the license, the County simply did not possess any information that would have led it to conclude, or even suspect, that Fry would engage in sexual abuse of a foster child or would otherwise present a risk as a foster parent. Further, Shawano County never had custody of Waubanascum, and it was not even involved in the process whereby Waubanascum was placed in the Fry home as a foster child. Instead, Menominee County had custody over Waubanascum, and it alone placed him with Fry. (R. 127 at 408-09; R. 125 at 491-92; R. 126 at 119 & 122-23.) Based on these facts, and as the Seventh Circuit properly found, no reasonable jury could have concluded that Shawano County had any knowledge or suspicion of the risk posed by Fry to Waubanascum in issuing the foster care license to Fry.

As to the criminal background check conducted in connection with Fry's application, the evidence indicated that the check undertaken by Menominee County had not yet been completed at the time Shawano County issued

the license to Fry (and that the home care study relied on by Shawano County indicated as much). (Exs. 1002 & 1; R. 125 at 456 & 469; R. 126 at 108.) Further, viewed in the light most favorable to Waubanascum, the evidence at trial showed that the criminal background check conducted by Menominee County did not search for convictions outside of Wisconsin. (R. 127 at 419.) Yet, as the Seventh Circuit observed, none of these facts allowed for a reasonable inference that events would have unfolded any differently had Shawano County done the check itself or if it had waited for the results of the check by Menominee County before it issued the license. (App. at A-14.) Indeed, which county (Menominee or Shawano) requested the check had no bearing on the content of the results. In addition, because the check ultimately came back clear, Fry's license would not have been held up even had Shawano County possessed the results before it issued the license. The fact that the Wisconsin Department of Justice, which conducted the check, did not search for convictions outside of Wisconsin cannot reasonably be construed as anything more than negligence on the part of the State of Wisconsin (rather than a constitutional wrong on the part of the County). (*Id.*)

b. The Monitoring Of The License.

Focusing on the fact that allegations of sexual abuse were first raised against Fry in October 1995 by another minor, Waubanascum contends that a reasonable jury could have concluded that Shawano County acted with deliberate indifference in failing to remove Waubanascum from Fry's home or suspend or revoke Fry's license in the fall of 1995. According to Waubanascum, a reasonable jury could have concluded that Shawano County failed to do so

because of the County's policy with respect to courtesy foster care licenses. (Petition at 15-16.)[3]

Viewed in the light most favorable to Waubanascum, the evidence on this issue showed that on October 21, 1995, Shawano County Deputy Sheriff Randall Giese received an uncorroborated complaint from a child that he had been sexually assaulted by Fry. (R. 126 at 151-52 & 159; R. 127 at 412.) The evidence showed that Giese began to investigate this possible abuse and that he contacted the Menominee County Department of Social Services to warn Menominee County of the allegations in light of the fact that Waubanascum had been placed by Menominee County in Fry's home. (R. 127 at 412.) The testimony at trial reflected that Menominee County reviewed its initial decision to place Waubanascum in Fry's home and decided to leave Waubanascum in the home. Menominee County based this decision on its social workers' questioning of Waubanascum outside the presence of Fry and its daily observations of Waubanascum under its Intensive Supervision Program. (*Id.* at 413-16; R. 125 at 432, 508, & 511.) As the Seventh Circuit noted, "Menominee County retained legal custody of Waubanascum and continued to monitor his status in Fry's home under its highest level of supervision." (App. at A-18.)

At trial, Waubanascum placed great emphasis on Deputy Giese's testimony that he also contacted an intake worker at the Shawano County Department of Social Services and advised this person of the allegations made

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[3] Waubanascum makes this argument despite the fact that his counsel repeatedly represented at trial that he did not intend to pursue a claim against Shawano County for failing to monitor Waubanascum's placement in Fry's home. (*See, e.g.*, R. 126 at 126, 147, & 153-54.)

against Fry by the other child. Based on this testimony, the jury was invited to believe that they could find that Shawano County acted with deliberate indifference with respect to Waubanascum and thus violated his constitutional rights based on the conduct of Deputy Giese and this unidentified intake worker.

This evidence was an insufficient basis of § 1983 liability against Shawano County, a municipal entity, for three principal reasons. First, Waubanascum did not present any evidence that would have allowed for a reasonable inference that Shawano County had a policy or custom of any kind of failing to investigate alleged incidents of abuse within foster homes licensed by the County. Indeed, on the contrary, the Director of the County's Department of Social Services testified that the County would investigate and take appropriate action with respect to any allegations of abuse in a Shawano County foster home. (R. 125 at 492.) Further, the record reflects that the County terminated Fry's foster care license as soon as Waubanascum's allegations of abuse arose in the spring of 2005. (R. 126 at 112, 127, & 141-42; R. 125 at 493.) Thus, contrary to the most fundamental teachings of *Monell*, no reasonable jury could have concluded that the County had a policy or custom of failing to investigate allegations of abuse within its foster homes. *See, e.g., City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985) (noting that "[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell* unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker").

Second, Waubanascum offered no proof outside of the events relating to his own circumstances at trial. As a

result, no reasonable jury could have concluded that the County was on notice of a problem relating to its supervision of foster care licenses so as to subject it to liability for either encouraging or condoning a series of bad acts on the part of its agents. *See, e.g., Monell*, 436 U.S. at 691 (describing practices so "permanent and well settled as to constitute a 'custom or usage' with the force of law"); *Estate of Novack ex rel. Turbin v. County of Wood*, 226 F.3d 525, 531 (7th Cir. 2000) (describing municipal liability under § 1983 for a custom as requiring a showing of a series of bad acts from which a jury could infer that the municipality was bound to have noticed what was going on and, by failing to do anything, either encouraged or condoned the misconduct).

Finally, Waubanascum did not present any evidence that the information possessed by Deputy Sheriff Giese and allegedly passed from him to an intake worker at the County's Department of Social Services was ever relayed to a policymaker for Shawano County. *See, e.g., Pembaur v. City of Cincinnati*, 475 U.S. 469, 482-83 (1986) (describing a municipal policymaker sufficient to bind a municipality as one who has final decision making authority over the subject at issue). Giese's testimony at trial was that he informed only an unnamed intake worker at the Shawano County Department of Social Services of the status of his investigation. (R. 126 at 162-63.) In addition, Stuber and his deputy, Kane, specifically testified at trial that they were unaware of Officer Giese's investigation or any suspected abuse of Waubanascum until Waubanascum's own allegations of abuse came to light in the spring of 1995. (*Id.* at 112-13, 127, & 141.) As the Seventh Circuit properly observed, in the absence of a single shred of evidence to the contrary, no reasonable jury could have

concluded that a Shawano County policymaker had knowledge of this information and failed to respond. (App. at A-18.)

II. THE SEVENTH CIRCUIT PROPERLY CONCLUDED THAT SHAWANO COUNTY DID NOT OWE WAUBANASCUM A DUTY UNDER EITHER OF THE TWO EXCEPTIONS TO *DESHANEY*.

At trial, Waubanascum did not dispute that Shawano County never took him into its custody. Instead, it was undisputed that Menominee County had legal custody over Waubanascum the entire time he was in the Fry home. (R. 126 at 119 & 122; R. 127 at 408-09; R. 125 at 491-92.) Further, Shawano County was not responsible for the placement of children in the Fry home under the foster care license. Rather, Menominee County accepted that responsibility, and Menominee County actually placed Waubanascum in the Fry home. (R. 126 at 123-24; R. 127 at 399 & 403; R. 125 at 459; Ex. 1005.) Indeed, Shawano County had no knowledge that Waubanascum had even been placed in Fry's home. (R. 126 at 115 & 118.) Finally, Menominee County, and not Shawano County, was responsible for supervising the Fry foster home (under its Intensive Supervision Program, no less), and it immediately removed Waubanascum from Fry's care once it learned of his abuse. (R. 127 at 399; R. 125 at 459; R. 126 at 124; Ex. 1005.) Under these circumstances, the Seventh Circuit properly concluded that Waubanascum had not established that Shawano County had a "special relationship" with him or that the County had affirmatively placed him in a position of danger sufficient to implicate either of the exceptions to the general rule of *DeShaney*.

A. The Special Relationship Exception.

With respect to the "special relationship" exception to *DeShaney*, the Seventh Circuit first noted that Waubanascum had not shown that he had ever been in the custody of Shawano County. (App. at A-10.) In so noting, the Seventh Circuit traced Waubanascum's status from the time he was removed from his grandparents' custody through to his removal from the Fry foster home, observing that Menominee County, not Shawano County, had him in its custody and performed any and all protective, investigative, and administrative functions relative to him this entire time. (*Id.*) Thus, contrary to Waubanascum's suggestions, the Seventh Circuit's decision was anything but the result of a formalistic distinction relying solely on the issue of which county had "legal" custody over him.

In any event, the Seventh Circuit's reasoning on this point is squarely in line with *DeShaney* and is anything but in conflict with the decisions of the other federal circuits on this issue. Indeed, in *DeShaney*, this Court reviewed prior due process decisions, noting that "[t]aken together, they stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being." 489 U.S. at 199-200. In such instances, this Court explained, "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id.* at 200. Further:

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through

> incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id.

All of the federal circuit courts have adhered to this line of reasoning in applying the "special relationship" exception first articulated in *DeShaney*. *See, e.g.*, *Rivera v. Rhode Island*, 402 F.3d 27, 34 (1st Cir. 2005) (observing that a special relationship may exist "when the individual is incarcerated or is involuntarily committed to the custody of the state"); *Ying Jing Gan v. City of New York*, 996 F.2d 522, 533 (2nd Cir. 1993) (noting that special relationships have been recognized in "custodial relationships such as a prison and inmate or a mental institution and involuntarily committed patient and the relationship between a social service agency and foster child"); *Brown v. Pennsylvania Dep't of Health Emergency Med. Servs. Training Inst.*, 318 F.3d 473, 478 (3rd Cir. 2003) (noting that the special relationship exception exists "when the state restrains an individual so as to expose the individual to harm"); *Patten v. Nichols*, 274 F.3d 829, 841 (4th Cir. 2001) (reasoning that "an exception to the general no-duty-to-act rule arises only if the state takes an individual into custody; if there is no custodial relationship, then the state has no duty to protect"); *Walton v. Alexander*, 44 F.3d 1297, 1303 (5th Cir. 1995) (observing that "only when the state, by its affirmative exercise of power, has custody over an individual *involuntarily or against his will* does a 'special relationship' exist between the individual and the state") (emphasis in original); *Sargi v. Kent City Bd. of Educ.*, 70

F.3d 907, 911 (6th Cir. 1995) (noting that "[a] special relationship can only arise when the *state* restrains an individual") (emphasis in original); *Hutchinson ex rel. Baker v. Spink*, 126 F.3d 895, 900 (7th Cir. 1997) (stating that "the State has a 'special relationship' with those it has taken into custody"); *Avalos v. City of Glenwood*, 382 F.3d 792, 799 (8th Cir. 2004) (noting that "the state owes a duty to protect those in its custody"); *Wang v. Reno*, 81 F.3d 808, 818 (9th Cir. 1996) (government created special relationship with alien by paroling him into United States and placing him in its custody); *Christiansen v. City of Tulsa*, 332 F.3d 1270, 1280 (10th Cir. 2003) ("Absent involuntary restraint, . . . no duty to protect arises under the special relationship theory"); *Lovins v. Lee*, 53 F.3d 1208, 1210 & 1211 (11th Cir. 1995) (citing examples of special relationships with incarcerated prisoners, involuntarily committed mental patients, and children taken into custody and then placed in foster homes).

The two lone cases cited by Waubanascum do not create a circuit split. In *Horton v. Flenory*, for instance, the Third Circuit concluded that the evidence was sufficient to permit a finding that an individual was in state custody at the time of his fatal beating by the owner of a private club when his liberty had been restrained by the club owner, who was "investigating" a burglary under a delegation of authority from and with the knowledge of the local police. 889 F.2d 454, 458 (3rd Cir. 1989). The Eight Circuit's decision in *Wells v. Walker*, on the other hand, was handed down before this Court's decision in *DeShaney* and neither explains its finding of a constitutional duty under the Fourteenth Amendment nor distinguishes between the special relationship and the heightened danger exceptions. 852 F.2d 368, 371 (8th Cir. 1988).

Further, as the Seventh Circuit observed, the fact that Wisconsin laws and regulations prescribe certain duties with respect to foster care licensing is not sufficient to create a special relationship between Shawano County and Waubanascum. (App. at A-11 – A-12.) Indeed, as is noted above in Point I, state laws do not define the scope of a government entity's duties under the Fourteenth Amendment, and violations of state law are not sufficient to impose liability under § 1983. *See, e.g., DeShaney*, 489 U.S. at 202.

B. The State Created Danger Exception.

Waubanascum contends that the Seventh Circuit should have examined the "state created danger" exception to *DeShaney* in the "overall context" of Shawano County's alleged actions and inactions in this case. (Petition at 20.) Contrary to Waubanascum's suggestions, the Seventh Circuit did just that, and it properly concluded that no due process duty arose under this theory either.

As the Seventh Circuit described the "state created danger" exception to *DeShaney*, a due process duty may exist when the state "affirmatively places a particular individual in a position of danger the individual would not otherwise have faced." (App. at A-9 (citing *Monfils*, 165 F.3d at 516; *Lewis v. Anderson*, 308 F.3d 768, 773 (7th Cir. 2002)).) Examining all of the evidence introduced at trial, the Seventh Circuit properly concluded that Waubanascum had not met his burden of proof under this exception to *DeShaney*. Indeed, as the Seventh Circuit recognized, Shawano County issued the foster care license to Fry, but the license made no requirements or limitations as to who

would be placed in the home. To the contrary, the placement of a child in Fry's home was the responsibility of Menominee County, and Shawano County played no role in placing Waubanascum in the home. (App. at A-17.) Thus, as the Seventh Circuit concluded, the evidence at trial was insufficient to show that Shawano County "affirmatively placed Waubanascum into harm's way when it did not even know of Waubanascum's existence at the time it issued the license to Fry." (*Id.* at A-18.)

In reaching this conclusion, the Seventh Circuit relied, in part, on the Tenth Circuit's decision in *Ruiz v. McDonnell*, 299 F.3d 1173 (10th Cir. 2002). (*Id.* at A-16 – A-17.) In *Ruiz*, a mother brought suit against employees of the Colorado Department of Human Services after her child died in a state licensed day care facility alleging that the defendants had improperly licensed the facility by conducting an insufficient background investigation. *Id.* at 1178. The Tenth Circuit affirmed the dismissal of the mother's due process claims, concluding that she could not make out a claim under the "state created danger" exception to *DeShaney*. *Id.* at 1183. According to the Tenth Circuit, the license in *Ruiz* did not impose an immediate risk of harm and instead affected the public at large rather than the deceased child. *Id.*

Likewise, as the Seventh Circuit observed here, the Shawano County license to Fry did not present an immediate risk and instead affected the universe of children who were potentially eligible to be placed in Fry's home (by Menominee County) rather than Waubanascum himself. (App. at A-17 – A-18.) Although the license only permitted one placement at a time in Fry's home, it still was not issued specifically for Waubanascum and did not, in and of itself, place Waubanascum in any danger. (*Id.* at

A-17 (citing *Ruiz*, 299 F.3d at 1183).) As a result, the license cannot be said to have resulted in a state created danger under the second exception to *DeShaney*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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